No. 04-5928 *** CAPITAL CASE ***
Title: Jose Ernesto Medellin, Petitioner
v.
Doug Dretke, Director, Texas Department of Criminal Justice, Correctional Institutions Division
Docketed: August 20, 2004
Lower Ct: United States Court of Appeals for the Fifth Circuit
Case Nos.: (03-20687)
Decision Date: May 20, 2004
Questions Presented

~~Date~~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~
Mar 4 2004	Opposition of respondent to petitioner's application to exceed the page limitation.
Aug 18 2004	Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due September 20, 2004)
Aug 18 2004	Appendix of Jose Ernesto Medellin filed.
Sep 15 2004	Order extending time to file response to petition to and including October 20, 2004.
Sep 20 2004	Consent to the filing of amicus briefs in support of either party received from counsel for the petitioner.
Oct 19 2004	Brief amici curiae of Ambassador Bruce Laingen, et al. filed.
Oct 20 2004	Brief amici curiae of Amnesty International, et al. filed.
Oct 20 2004	Brief amici curiae of European Union and Members of the International Communtiy filed.
Oct 20 2004	Brief amici curiae of Foreign Sovereigns, Argentina, et al. filed.
Oct 20 2004	Brief amici curiae of International Law Experts, et al. filed.
Oct 20 2004	Brief amicus curiae of Government of the United Mexican States filed.
Oct 27 2004	Order further extending time to file response to petition to and including October 27, 2004.
Oct 27 2004	Brief of respondent Doug Dretke, Director, Texas Department of Criminal Justice, Correctional Institutions Division in opposition filed. (PRINTED BRIEF)
Nov 9 2004	Reply of petitioner Jose Ernesto Medellin filed. (Distributed)
Nov 10 2004	DISTRIBUTED for Conference of November 24, 2004.
Nov 29 2004	DISTRIBUTED for Conference of December 3, 2004.
Dec 6 2004	DISTRIBUTED for Conference of December 10, 2004.
Dec 10 2004	Motion to proceed in forma pauperis and petition for a writ of certiorari GRANTED.
Dec 17 2004	Consent to the filing of amicus briefs in support of either party received from counsel for the petitioner.
Jan 19 2005	SET FOR ARGUMENT ON Monday, March 28, 2005.
Jan 24 2005	Brief amici curiae of European Union and Members of the International Communtiy filed.
Jan 24 2005	Brief amicus curiae of Government of the United Mexican States filed.
Jan 24 2005	Brief amici curiae of Former United States Diplomats filed.
Jan 24 2005	Brief amici curiae of Bar Associations and Human Rights Organizations filed.
Jan 24 2005	Brief amici curiae of NAFSA : Association of International Educators, et al. filed.

Jan 24 2005	Brief amici curiae of Ambassador Bruce Laingen, et al. filed.
Jan 24 2005	Joint appendix filed.
Jan 24 2005	Brief amicus curiae of American Bar Association filed.
Jan 24 2005	Brief amici curiae of International Law Experts, et al. filed.
Jan 24 2005	Brief amici curiae of Foreign Sovereigns, Argentina, et al. filed.
Jan 24 2005	Brief of petitioner Jose Ernesto Medellin filed.
Feb 4 2005	CIRCULATED.
Feb 18 2005	Brief amicus curiae of Alliance Defense Fund filed. (Distributed)
Feb 23 2005	Record received from U.S.C.A. 5th Circuit. (1 volume)
Feb 25 2005	Application (04A739) to file an amicus curiae brief on the merits in excess of page limits, submitted to Justice Scalia.
Feb 25 2005	Application (04A739) to file in excess of page limits granted by Justice Scalia. The brief may not exceed 50 pages.
Feb 28 2005	Brief of respondent Doug Dretke, Director, Texas Department of Criminal Justice, Correctional Institutions Division filed. (Distributed)
Feb 28 2005	Brief amici curiae of Professors of International Law, et al. filed. (Distributed)
Feb 28 2005	Brief amici curiae of Alabama, et al. filed. (Distributed)
Feb 28 2005	Brief amicus curiae of National District Attorneys Association filed. (Distributed)
Feb 28 2005	Brief amicus curiae of Liberty Legal Institute filed. (Distributed)
Feb 28 2005	Brief amicus curiae of John Cornyn filed. (Distributed)
Feb 28 2005	Brief amicus curiae of Mountain States Legal Foundation filed. (Distributed)
Feb 28 2005	Brief amici curiae of Washington Legal Foundation, et al. filed. (Distributed)
Feb 28 2005	Brief amicus curiae of United States filed. (Distributed)
Feb 28 2005	Brief amicus curiae of Criminal Justice Legal Foundation filed. (Distributed)
Mar 4 2005	Application (04A758) to file petitioner's reply brief on the merits in excess of page limits, submitted to Justice Scalia.
Mar 7 2005	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Mar 7 2005	Application (04A758) to file in excess of page limits granted by Justice Scalia. The applicant's reply brief on the merits may not exceed 30 pages.
Mar 9 2005	Motion to stay further proceedings filed by petitioner.
Mar 10 2005	Letter from the Solicitor General received. (Distributed).
Mar 15 2005	Response of respondent to petitioner's motion to stay filed. (Distributed)
Mar 15 2005	Motion DISTRIBUTED for Conference of March 18, 2005.
Mar 18 2005	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED. to be divided as follows: 30 minutes for petitioner; 20 minutes for respondent; and 10 minutes for the United States.
Mar 21 2005	Reply of petitioner Jose Ernesto Medellin filed. (Distributed)
Mar 24 2005	Letter from counsel for the petitioner received. (Distributed).
Mar 28 2005	Argued. For petitioner: Donald F. Donovan, New York, N.Y. For respondent: R. Ted Cruz, Solicitor General, Austin, Tex.; and Michael R. Dreeben, Deputy Solicitor General, Department of Justice, Washington, D.C. (for United States, as amicus curiae.)

EDITOR'S NOTE

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No. __-__ (18)

04-5928

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

◆

JOSE ERNESTO MEDELLIN,

Petitioner,

—v.—

DOUG DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED
CAPITAL CASE

The United States and Mexico are party to the Vienna Convention on Consular Relations and its Optional Protocol Concerning the Compulsory Settlement of Disputes. Acting on the consent set forth in the Optional Protocol, Mexico initiated proceedings in the International Court of Justice seeking relief for the violation of Petitioner's Vienna Convention rights. On March 31, 2004, the Court rendered a judgment that adjudicated Petitioner's rights. Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 128 (Mar. 31). The *Avena* Judgment built on the Court's rulings in LaGrand (F.R.G. v. U.S.), 2001 I.C.J. 104 (June 27), an earlier case also brought under the Optional Protocol.

On Petitioner's application for a certificate of appealability of the denial of his petition for habeas corpus, the United States Court of Appeals for the Fifth Circuit held that precedents of this Court and its own barred it from complying with the *LaGrand* and *Avena* Judgments.

1. In a case brought by a Mexican national whose rights were adjudicated in the *Avena* Judgment, must a court in the United States apply as the rule of decision, notwithstanding any inconsistent United States precedent, the *Avena* holding that the United States courts must review and reconsider the national's conviction and sentence, without resort to procedural default doctrines?

2. In a case brought by a foreign national of a State party to the Vienna Convention, should a court in the United States give effect to the *LaGrand* and *Avena* Judgments as a matter of international judicial comity and in the interest of uniform treaty interpretation?

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JURISDICTION

The Court of Appeals entered judgment on May 20, 2004. This Court has jurisdiction to review the judgment under 28 U.S.C. § 1254.

CONSTITUTIONAL, TREATY, AND STATUTORY PROVISIONS INVOLVED

1. Clause 2 of Section 2 of Article II, Clause 1 of Section 2 of Article III, and Clause 2 of Article VI of the United States Constitution.

2. Article 36 of the Vienna Convention on Consular Relations, *opened for signature* April 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261.

3. Article I of the Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, *opened for signature* April 24, 1963, 21 U.S.T. 325, 596 U.N.T.S. 487.

4. Articles 92, 93(1), and 94(1) of the Charter of the United Nations, *opened for signature* June 26, 1945, 59 Stat. 1031.

5. Articles 1, 3(1), 9, 36(1), and 59 of the Statute of the International Court of Justice, 59 Stat. 1055.

STATEMENT OF THE CASE

A. The Vienna Convention and Its Optional Protocol.

The Vienna Convention on Consular Relations ("Vienna Convention"), *opened for signature* Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261, "is widely accepted as the standard of international practice of civilized nations, whether or not they are parties to the Convention." DEP'T OF STATE TELEGRAM 40298 TO THE U.S. EMBASSY IN DAMASCUS (February 21, 1975), *reprinted in* LUKE T. LEE, CONSULAR LAW AND PRACTICE 145 (2d ed. 1991).

Article 36 of the Convention enables consular officers to protect nationals who are detained in foreign countries. Article 36(1)(b) requires the competent authorities of the detaining state to notify "without delay" a detained foreign national of his right to request assistance from the consul of his own state and, if the national so requests, to inform the consular post of that national's arrest or detention, also "without delay." Article 36(1)(a) and (c) require the detaining country to permit the consular officers to render various forms of assistance, including arranging for legal representation. Finally, Article 36(2) requires that a country's "laws and regulations . . . enable full effect to be given to the purposes for which the rights accorded under this Article are intended." The United States has described the rights and obligations set forth in Article 36 as "of the highest order," in large part because of the reciprocal nature of the obligations and hence the importance of these rights to United States consular officers seeking to protect United States citizens abroad.[1]

The Optional Protocol Concerning the Compulsory Settlement of Disputes ("Optional Protocol"), *opened for signature* Apr. 24, 1963, 21 U.S.T. 325, 596 U.N.T.S. 261, provides that disputes "arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice." Optional Protocol, art. I.

The United States played a leading role at the 1963 diplomatic conference that produced the Vienna Convention and its Optional Protocol. *See* Report of the United States Delegation to the United Nations Conference on Consular Relations in Vienna, Austria, March 4 to April 22, 1963, *reprinted in* S. Exec. E, 91st Cong. at 59-61 (1st Sess. 1969). Among other things, the United States proposed the binding dispute settlement provision that became the Optional Protocol and successfully led the resistance to efforts by other states to weaken or eliminate altogether the dispute settlement provisions. *See id.* at 72-73.

The United States signed the Vienna Convention and its Optional Protocol on April 24, 1963, and President Nixon sent it to the Senate for approval on May 8, 1969. The Senate held hearings on October 7, 1969, and unanimously ratified the instruments on October 22, 1969. *See* 115 CONG. REC. 30,997 (Oct. 22, 1969). To date, 166 States have ratified the Vienna Convention and 45 States the Optional Protocol.[2] The Vienna Convention is among the most widely ratified multilateral treaties in force today. Lee, at 23-25.

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[1] ARTHUR W. ROVINE, U.S. DEP'T OF STATE, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 1973, at 161 (1973). As Judge Stephen Schwebel, the former United States Judge on the International Court of Justice, has observed, "the citizens of no State have a higher interest in the observance of [Vienna Convention] obligations than the peripatetic citizens of the United States." Vienna Convention on Consular Relations (Para. v. U.S.) 1998 I.C.J. 248, 259 (Provisional Measures Order of Apr. 9) (declaration of President Schwebel).

[2] *See Status of Multilateral Treaties Deposited with the Secretary-General, Vienna Convention on Consular Relations, at* http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIII/treaty31.asp.

B. The International Court of Justice.

Often referred to as the "World Court," the International Court of Justice is "the principal judicial organ of the United Nations." U.N. Charter art. 92; Statute of the International Court of Justice, art. 1, 59 Stat. 1055 ("ICJ Statute"). The Court's Statute is annexed to the U.N. Charter, so that States that become Members of the United Nations also become parties to the Statute. U.N. Charter art. 93, para. 1.

Here, too, the United States proposed the draft ICJ Statute and led the effort to create the Court. Ruth B. Russell, A History of the United Nations Charter: The Role of the United States 1940-1945, at 865 (1958). The United States saw the Court as a means to pursue its longstanding objective to promote the rule of law on the international level:

> Throughout its history the United States has been a leading advocate of the judicial settlement of international disputes. Great landmarks on the road to the establishment of a really permanent international court of justice were set by the United States. . . . As the United States becomes a party to [the U.N.] Charter which places justice and international law among its foundation stones, it would naturally accept and use an international court to apply international law and to administer justice.

Edward R. Stettinius, Jr., Secretary of State and Chairman of the United States Delegation, Charter of the United Nations: Report to the President on the Results of the San Francisco Conference 137-38 (1945).[3]

The United States has brought ten cases to the Court either as an applicant or by special agreement with another State. In another eleven cases, including *Avena*, the United States has been a respondent in an action brought by another State or States.[4]

C. The *Avena* Judgment.

On January 9, 2003, the Government of Mexico initiated proceedings in the International Court of Justice against the United States, alleging violations of the Vienna Convention in the cases of Mr. Medellin and 53 other Mexican nationals who had been sentenced to death in state criminal proceedings in the United States. *See* Mexico's Application Instituting Proceedings (Mex. v. U.S.), No. 128 (Avena and Other Mexican Nationals) (I.C.J. Jan. 9, 2003).[5]

On June 20, 2003, Mexico filed a 177-page Memorial and 1300-page Annex of written testimony and documentary evidence in support of its claims. On November 3, 2003, the United States filed a 219-page Counter-Memorial and 2500-

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[3] The Court is composed of fifteen judges, none of whom may have the same nationality. ICJ Statute, art. 3(1); *see also id.*, arts. 4, 9. "Judges are picked in their individual capacity, and are not political appointees of their respective governments." David J. Bederman et al., *International Law: A Handbook for Judges*, 35 Stud. in Transnat'l Legal Pol'y 76 (2003). As a result, "the judges of the ICJ are rarely politicized." David J. Bederman, International Law Frameworks 240 (2001).

[4] *See* International Court of Justice: List of Contentious Cases by Country, *at* http://www.icj-cij.org/icjwww/idecisions/icasesbycountry.htm#UnitedStatesofAmerica.

[5] The parties' written and oral pleadings as well as the orders and press releases of the Court in the *Avena* case are available at http://www.icj-cij.org/icjwww/idecisions.htm.

page Annex, also containing written testimony and documentary evidence in rebuttal. Both parties' submissions exhaustively addressed the factual predicate for each of the Vienna Convention violations alleged, including those in the case of Mr. Medellin, and argued all relevant points of law.

During the week of December 15, 2003, the International Court held a hearing. *Avena* Judgment, para. 11 (188A). The 18-person United States team was led by the Honorable William Howard Taft IV, Legal Advisor to the State Department, and included lawyers from the Departments of State and Justice and distinguished professors of international law and comparative criminal procedure from France and Germany.

On March 31, 2004, the International Court issued its Judgment. The *Avena* Judgment built on the Court's earlier holdings in LaGrand (F.R.G. v. U.S.), 2001 I.C.J. 104 (June 27) ("*LaGrand* Judgment"), which Germany also brought on the basis of the Optional Protocol, and in which the United States also fully participated.[6] However, in *Avena*, unlike *LaGrand*, the applicant State was able to seek relief on the merits for nationals who had not yet been executed.

As a result, in *Avena*, the International Court expressly adjudicated Mr. Medellin's own rights. *First*, the International Court held that the United States had breached Article 36(1)(b) in the cases of 51 of the Mexican nationals, including Mr. Medellin, by failing "to inform detained Mexican nationals of their rights under that paragraph" and "to notify the Mexican consular post of the[ir] detention." *Avena* Judgment, paras. 106(1)-(2), 153(4) (244A-245A, 272A).

Second, the International Court held that in 49 cases, including that of Mr. Medellin, the United States had violated its obligations under Article 36(1)(a) "to enable Mexican consular officers to communicate with and have access to their nationals, as well as its obligation under paragraph 1 (c) of that Article regarding the right of consular officers to visit their detained nationals." *Id.*, paras. 106(3), 153(5)-(6)(245A, 273A). The International Court also held that in 34 cases, including that of Mr. Medellin, the breaches of Article 36(1)(b) also violated the United States's obligation under paragraph 1(c) "to enable Mexican consular officers to arrange for legal representation of their nationals." *Id.*, paras. 106(4), 153(4), 153(7) (245A-246A, 272A, 273A).

Finally, as to remedies, the International Court first denied Mexico's request for annulment of the convictions and sentences. *Id.*, para. 123 (255A). The Court held, however, that United States courts must provide review and reconsideration of the convictions and sentences tainted by the violations it had found. *Id.*, paras. 121-22, 153(9) (254A, 274A). The International Court explained, *first*, that the required review and reconsideration must take place as part of the "judicial process;" *second*, that procedural default doctrines could not bar the required review and reconsideration; *third*, that the review and reconsideration must take account of the Article 36 violation on its own terms and not require that it qualify also as a violation of some other procedural or constitutional right; and *finally*, that the forum in which the review and reconsideration occurred must be capable of "examin[ing] the facts, and in particular the prejudice and its causes, taking account of the violation of the rights set forth in the Convention." *Id.*, paras. 113-14, 122, 134, 138-39, 140 (249A-250A, 254A, 259A-260A, 262A-263A).

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[6] In *LaGrand*, the International Court held that, *first*, Article 36 of the Vienna Convention provides "individual rights" to foreign nationals; *second*, by applying procedural default rules in the circumstances of those cases, the United States had applied its own law in a manner that failed to give full effect to the rights accorded under Article 36(1) and hence violated Article 36(2); and *finally*, if the United States failed to comply with Article 36 in future cases involving German nationals who were subjected to severe penalties, it must "allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in the Convention." *LaGrand* Judgment, paras. 77, 90-91, 125.

The International Court reached each of these holdings by a vote of fourteen to one. Both the United States and Mexican judges voted with the majority.

D. Mr. Medellin's Proceedings.

On June 29, 1993, law enforcement authorities arrested Jose Ernesto Medellin Rojas, 18 years old at the time, in connection with the murders of two young women in Houston, Texas. Mr. Medellin, a Mexican national, told the arresting officers he was born in Laredo, Mexico,[7] and informed Harris County Pretrial Services that he was not a United States citizen.[8] Nevertheless, as the Court of Appeals found, Mr. Medellin was not advised of his Article 36 right to contact the Mexican consul. 23A.

The United States recognizes that the consular assistance Mexico provides its nationals in capital cases is "extraordinary." 1 Counter-Memorial of the United States of America at 186 (Nov. 3, 2003) (*Avena* Case). At the time Mr. Medellin was arrested and tried, Mexican consular officers routinely assisted capital defendants by providing funding for experts and investigators, gathering mitigating evidence, acting as a liaison with Spanish-speaking family members, and most importantly, ensuring that Mexican nationals were represented by competent and experienced defense counsel.[9] As a result of the Article 36 violation in his case, however, Mr. Medellin had no opportunity to receive the assistance of Mexican consular officers either before or during his trial.

The Texas trial court appointed counsel to represent Mr. Medellin, who was indigent. Unbeknownst to the court, lead counsel was suspended from the practice of law for ethics violations during the investigation and prosecution of Mr. Medellin's case. Memorial of Mexico, App. A ¶ 232 (June 20, 2003) (*Avena* Case). Counsel failed to strike jurors who indicated they would automatically impose the death penalty,[10] and called no witnesses at the guilt phase of trial. On September 16, 1994, Mr. Medellin was convicted of capital murder. *State v. Medellin*, No. 675430, Judgment (339th D. Ct., Tex. Oct. 11, 1994).

At the penalty phase, the only expert witness the defense presented was a psychologist who had never met Mr. Medellin. S.F. Vol. 35 at 294-349. Mr. Medellin's parents testified only briefly. *Id.* at 279-92. The entire penalty phase defense lasted less than two hours. Tr. at 343-441 (Docket).

The jury recommended a death sentence, and on October 11, 1994, the trial court sentenced Mr. Medellin to death. On March 19, 1997, the Texas Court of Criminal Appeals affirmed Mr. Medellin's conviction and sentence in an unpublished opinion. 61A.

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[7] State's Ex. 113 at 000076 (Statement of Jose Ernesto Medellin Rojas).

[8] 165A.

[9] *See* Memorial of Mexico at 11-38 (*Avena* Case); *see also Valdez v. State*, 46 P.3d 703, 710 (Okla. Crim. App. 2002) (finding that Mexico would have provided critical resources in 1989 capital murder trial of Mexican national); Michael Fleischman, *Reciprocity Unmasked: The Role of the Mexican Government in Defense of Its Foreign Nationals In United States Death Penalty Cases*, 20 ARIZ. J. INT'L & COMP. L. 359, 365-74 (2003) (describing Mexico's consular assistance in capital cases in Texas and elsewhere over the last several decades).

[10] *See, e.g.*, S.F. Vol. 15 at 113; Vol. 16 at 205; Vol. 16 at 286.

On April 29, 1997, Mexican consular authorities learned of Mr. Medellin's detention when he wrote to them from death row and promptly began rendering assistance to him. Memorial of Mexico, App. A ¶ 235 (*Avena* Case).

On March 26, 1998, Mr. Medellin filed a state application for a writ of *habeas corpus* arguing, among other things, that his conviction and sentence should be vacated as a remedy for the violation of his Article 36 rights. In support of this claim, Mr. Medellin submitted an affidavit from Manuel Perez Cardenas, the Consul General of Mexico in Houston, explaining that Mexico would have provided immediate assistance if consular officers had been informed of his detention. 172A-173A.

After refusing to grant an evidentiary hearing, the trial court denied relief. Without changing so much as a comma, the court adopted the State's proposed findings of fact and conclusions of law, including the State's argument that the claim had been procedurally defaulted or, in the alternative, that Mr. Medellin "failed to show [his] foreign nationality," "lacked standing" to raise the Vienna Convention claim, and could not show that the violation affected the constitutional validity of his conviction or sentence. 46A-48A. On September 7, 2001, the Texas Court of Criminal Appeals affirmed in an unpublished order. 33A.

On November 28, 2001, Mr. Medellin filed a petition for a writ of *habeas corpus* in the United States District Court for the Southern District of Texas, and on July 18, 2002, an amended petition. Mr. Medellin again raised an Article 36 claim.

On June 26, 2003, the District Court denied relief and a certificate of appealability ("COA"), finding the Vienna Convention claim procedurally defaulted under "an adequate and independent state procedural rule." 82A. In the alternative, the District Court concluded that it was compelled to deny relief by Fifth Circuit precedent to the effect that the Vienna Convention does not create individually enforceable rights, that no judicial remedy is available for its violation, and that Mr. Medellin could not show prejudice unless the Vienna Convention violation also qualified as a violation of a constitutional right. 84A-85A & n.17.

On May 20, 2004, the Court of Appeals also denied Mr. Medellin's request for a COA. 135A. The Court recognized that *Avena*, which had issued since the District Court's ruling, had been brought on behalf of Mr. Medellin, among others. It also recognized that the International Court had held in *LaGrand* and reiterated in *Avena* that, *first*, the application of procedural default rules to bar review of the Vienna Convention claim on the merits violated Article 36 of the Convention, and *second*, that Article 36 conferred individually enforceable rights. It held, however, that the first holding "contradict[ed]" this Court's brief *per curiam* order in *Breard v. Greene*, 523 U.S. 371 (1998), and that the second contravened its own ruling in *United States v. Jimenez-Nava*, 243 F.3d 192 (5th Cir. 2001). It held, therefore, that it was bound to disregard *LaGrand* and *Avena* unless and until this Court or, in terms of the second holding, the *en banc* Court of Appeals, decided otherwise. 131A-133A.

ARGUMENT

Because the United States is party to the Vienna Convention and its Optional Protocol, the *Avena* Judgment constitutes a binding adjudication of the Vienna Convention rights of Mr. Medellin and fifty other Mexican nationals. Although the Court of Appeals recognized the impact of that Judgment on Mr. Medellin's case, it held that it was barred by prior precedent from giving effect to the Judgment.

Hence, this Court should grant the petition in order to prevent the United States from breaching its freely undertaken commitment to the international community to abide by the *Avena* Judgment. This Court should also grant the petition in order to resolve the conflicts among this Court, the International Court of Justice, and other United States courts on the proper interpretation and application of the Vienna Convention.

I. The Court Should Grant the Petition In Order To Bring The United States Into Compliance With Its Obligation To Abide By The *Avena* Judgment.

A. The Court of Appeals Was Bound to Give Effect to the *Avena* Judgment As the Rule of Decision in Mr. Medellin's Case.

1. The Vienna Convention, the Optional Protocol, and the *Avena* Judgment Are Binding International Law.

The *Avena* Judgment is binding on the United States as a matter of international law for the simple reason that the United States agreed that it would be binding.

The jurisdiction of the International Court of Justice is based entirely on consent.[11] Under Article 36(1) of the Statute of the Court, the Court has jurisdiction over "all matters specially provided for . . . in treaties and conventions in force." ICJ STATUTE, art. 36(1). The Optional Protocol to the Vienna Convention constitutes a compromissory clause covering just such a "class of matters specially provided for." DAVID J. BEDERMAN, INTERNATIONAL LAW FRAMEWORKS 242 (2001). The Optional Protocol provides:

> Disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol.

Optional Protocol, art. I.

Hence, by ratifying the Optional Protocol, the United States both gained the right to sue and agreed to be subject to suit in the International Court of Justice in order to resolve disputes with other parties to the Optional Protocol regarding the "interpretation and application" of the Vienna Convention.[12] Though neither the United Nations Charter nor the ICJ Statute, both treaties to which the United States is party, provide the requisite consent, the binding character of the Court's adjudication in cases in which a State has given consent is reinforced by both those instruments. Article 59 of the ICJ Statute provides that decisions of the Court are binding on the parties to the case. And by Article 94(1) of the Charter, the United States unequivocally agreed "to comply with the decision of the International Court of Justice in any case to which it is a party." RESTATEMENT (THIRD) FOREIGN RELATIONS § 903 cmt. g (1987).

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[11] David J. Bederman et al., *International Law: A Handbook for Judges*, 35 STUD. IN TRANSNAT'L LEGAL POL'Y 76, 76-77 (2003). ("Every matter that comes before the ICJ does so because of the consent of the litigants. The only question is how that consent is manifested. The Court does not – and cannot – exercise a mandatory form of jurisdiction over states.").

[12] Indeed, the United States was the first State to take advantage of that instrument, when in 1979 it sued Iran in the International Court to enforce rights, among others, under the Vienna Convention, and founded the Court's jurisdiction in part on the Optional Protocol. *See* United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3 (May 24), *reprinted in* 19 I.L.M. 553 (1980).

The rule of *pacta sunt servanda* – that parties should perform their treaty obligations in good faith – "lies at the core of the law of international agreements and is perhaps the most important principle of international law." RESTATEMENT (THIRD) FOREIGN RELATIONS § 321 cmt. a (1987).[13] Here, the application of the rule could not be more straightforward: having agreed to submit disputes involving the Vienna Convention to the International Court, the United States must now abide by its adjudication of those disputes.[14]

2. The Vienna Convention, the Optional Protocol, and the *Avena* Judgment Are Binding Federal Law.

The United States Constitution places the power to make treaties in the hands of the democratically elected branches of the federal government. Article II, section 2, clause 2, provides that the President "shall have Power . . . to make Treaties." U.S. CONST. art. II, § 2, cl. 2. The President may do so, however, only "with the Advice and Consent of the Senate." *Id.* For the Senate to grant consent, "two thirds of the Senators present [must] concur." *Id.* This structure ensures that the United States takes on international treaty obligations only with the clear support of the elected representatives of the American people. *See generally* LOUIS HENKIN, FOREIGN AFFAIRS AND THE US CONSTITUTION 36-37 (2d ed. 1996).

Under the Supremacy Clause, a ratified treaty has the status of preemptive federal law.[15] Hence, as this Court has long held, a ratified treaty

> is a law of the land as an act of Congress is, *whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined.* And when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would to a statute.

Edye v. Robertson (Head Money Cases), 112 U.S. 580, 598-99 (1884) (emphasis added).

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[13] *See* THE FEDERALIST NO. 64, at 394 (John Jay) (Clinton Rossiter ed., 1961) ("[A] treaty is only another name for a bargain[;] it would be impossible to find a nation who would make any bargain with us, which should be binding on them *absolutely*, but on us only so long and so far as we may think proper to be bound by it.") (emphasis in original). *See also Am. Dredging Co. v. Miller*, 510 U.S. 443, 466 (1995) (Kennedy, J., dissenting) ("Comity with other nations and among the States was a primary aim of the Constitution. At the time of the framing, it was essential that our prospective foreign trading partners know that the United States would uphold its treaties, respect the general maritime law, and refrain from erecting barriers to commerce.").

[14] *See* ROSENNE'S THE WORLD COURT: WHAT IT IS AND HOW IT WORKS 67 (Terry D. Gill, ed., 6th ed. 2003) ("Neither the Charter of the United Nations, nor any general rule of present-day international law, imposes on States the obligation to refer their legal disputes to the Court—but once consent has been given, the decision of the Court is final and binding and without appeal, and the States parties to the litigation are obliged to comply with that decision."); *see also La Abra Silver Mining Co. v. United States*, 175 U.S. 423, 463 (1899) ("[A]n award by a tribunal acting under the joint authority of two countries is conclusive between the governments concerned and must be executed in good faith unless there be ground to impeach the integrity of the tribunal itself.").

[15] Emphasis added. Article VI, clause 2, provides: "This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and *all Treaties made, or which shall be made*, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." *See* Sandra Day O'Connor, *Federalism of Free Nations*, *in* INTERNATIONAL LAW DECISIONS IN NATIONAL COURTS 13, 18 (1996) ("The Supremacy Clause of the United States Constitution gives legal force to foreign treaties, and our status as a free nation demands faithful compliance with the law of free nations.").

The treaty obligations reflected in the Vienna Convention and its Optional Protocol are entirely self-executing; they required no implementing legislation to come into force. *See Hearing Before the Senate Comm. on Foreign Rel.*, S. EXEC. REP. NO. 91-9, 91st Cong. at 5 (1st Sess. 1969) (statement of J. Edward Lyerly, Deputy Legal Adviser for Administration, U.S. Department of State). As President Richard M. Nixon stated when he announced their entry into force

> the [Vienna] Convention and Protocol . . . and every article and clause thereof shall be observed and fulfilled with good faith, on and after December 24, 1969, by the United States of America and by the citizens of the United States of America and all other persons subject to the jurisdiction thereof.

21 U.S.T. 77, 185.

B. The Court Should Ensure the United States's Compliance with its International Obligations.

Because the Vienna Convention and its Optional Protocol are fully effective as federal law, the Court of Appeals should have applied *Avena* as the rule of decision in determining whether to grant a certificate of appealability.[16] Given the United States's commitment to abide by that judgment, the district court's resolution of Mr. Medellin's Vienna Convention claim was not just "debatable," but plainly wrong. *See Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003).[17] For the same reason, there also can be no debate that "the issues presented are adequate to deserve encouragement to proceed further." *Id.* at 327 (citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). By failing to issue the certificate, the Court of Appeals both erred as a matter of federal law and placed the United States in breach of its international obligations.[18]

This Court should grant the petition in order to prevent the breach of treaty that would otherwise result from the

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[16] For example, in *Wildenhus's Case*, 120 U.S. 1 (1887), New Jersey sought to try a Belgian crewmember who was subject to a treaty allocating criminal jurisdiction over sailors on ships in American ports between the local courts and the Belgian consulate. Asserting a right under the treaty to try the crewmember, the Belgian consul sought a writ of habeas corpus. After noting that "[t]he treaty is part of the supreme law of the United States, and has the same force and effect in New Jersey that it is entitled to elsewhere," this Court held that "[i]f it gives the consul of Belgium exclusive jurisdiction over the offense which it is alleged has been committed within the territory of New Jersey, we see no reason why he may not enforce his rights under the treaty by writ of habeas corpus in any proper court of the United States." 120 U.S. at 17. *Cf. Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2767 (2004) (denying relief under Alien Tort Statute, 28 U.S.C. § 1350, in part because treaties at issue were not self-executing and thus could not "establish the relevant and applicable rule of international law").

[17] Should there be any doubt on this point, one need only look to the decision in *United States ex rel. Madej v. Schomig*, 223 F. Supp. 2d 968 (N.D. Ill. 2002) (*LaGrand* forecloses strict reliance on procedural default doctrine for Convention violations and thus "undermin[es] a major premise of [*Breard*]").

[18] *See, e.g.*, IAN BROWNLIE, STATE RESPONSIBILITY, PART 1, 144 (1983) ("The judiciary and the courts are organs of the state and they generate responsibility in the same way as other categories of officials."); *see also* Arrest Warrant of 11 April 2000 (D.R.C. v. Belg.), paras. 75-76, 2002 ICJ 121 (Feb. 14) (issuance of arrest warrant by Belgian investigative judge violated rule of customary international law recognizing head-of-state immunity); *LaGrand* Judgment, paras. 111-15 (failure of U.S. State Department, U.S. Solicitor General, Governor of Arizona, and this Court to "take all measures at [their] disposal" to prevent execution violated United States's treaty obligation to abide by order of provisional measures); Iran v. United States, Case No. 27, Award No. 586-A27-FT, 1998 WL 1157733, para. 71 (Iran-U.S. Cl. Trib. June 5, 1998) (refusal of U.S. courts to enforce Iran-U.S. Claims Tribunal award violated United States's obligation under Algiers Accords to treat Tribunal awards as final and binding).

Court of Appeals' error. To be sure, this Court does not sit to correct routine error. But the Framers gave treaties the status of supreme federal law and included cases arising under treaties within the federal judicial power precisely in order to enable this Court to prevent the lower courts of the United States from breaching an international obligation by refusing to enforce a treaty or other international obligation. U.S. CONST. art. III, § 2, cl. 1; art VI, cl. 2.

As James Madison emphasized at the Constitutional Convention:

> The tendency of the States to th[e] violations [of the law of nations and of treaties] has been manifested in sundry instances. . . . A rupture with other powers is among the greatest of national calamities. It ought therefore to be effectually provided that no part of a nation shall have it in its power to bring them on the whole.

1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 316 (Max Farrand ed., rev. ed. 1966). Alexander Hamilton made the same point when he said that "the peace of the whole ought not to be left at the disposal of a part," so that "the responsibility for an injury ought ever to be accompanied with the faculty of preventing it." THE FEDERALIST NO. 80, at 476 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

To achieve that end, the Framers gave this Court the final authority to ensure enforcement of our treaty obligations.

> The treaties of the United States, to have any force at all, must be considered as part of the law of the land. Their true import . . . must, like all other laws, be ascertained by judicial determinations. To produce uniformity in these determinations, they ought to be submitted, in the last resort, to one supreme tribunal.

THE FEDERALIST NO. 22, at 150 (Alexander Hamilton) (Clinton Rossiter ed., 1961).[19]

This case presents precisely the circumstances in which the Framers expected this Court to intervene. Acting on behalf of the United States, the President, with the consent of the Senate, has agreed to abide by the *Avena* Judgment. But the Court of Appeals has concluded – in large part on the basis of this Court's own precedent – that the United States cannot comply. Left undisturbed, that decision would be the kind of "national calamit[y]" against which Madison warned – because it would send a message to the world that we preach, but do not practice, adherence to the rule of law.

While the death penalty itself is not at issue in this case, the death penalty context makes the petition all the more compelling. The next step in this case will be Mr. Medellin's execution. If there were any case in which this Court should not send a message to friends and allies that the United States is indifferent to its international commitments, it is this one, in which the Court would send at the same time a message that the United States is indifferent to human life.

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[19] *See also* 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 490 (Jonathan Elliot ed., 2d ed. 1881) ("[T]he provision for judicial power over cases arising under treaties], sir, will show the world that we make the faith of treaties a constitutional part of the character of the United States; that we secure its performance no longer nominally, for the judges of the United States will be enabled to carry it into effect.") (statement of James Wilson).

II. The Court Should Grant The Petition In Order To Resolve The Conflicts Among This Court, The International Court of Justice, And Other United States Courts About The Vienna Convention And The *LaGrand* And *Avena* Judgments.

In *Breard v. Greene*, 523 U.S. 371 (1998), by a brief *per curiam* order, this Court refused to stay the imminent execution of a foreign national who had been convicted and sentenced to death in proceedings that Virginia conceded had violated the Vienna Convention, but who had been held to have procedurally defaulted the Vienna Convention claim.[20] The Court observed that the Convention "arguably" conferred an individual right that the foreign national, as well as the State party to the Convention, could enforce. *Id.* at 376. It stated, however, that as a matter of international law, absent a clear and express statement to the contrary, implementation of the Vienna Convention was subject to the procedural rules of the forum state. *Id.* at 375. Hence, the Court concluded, the Convention did not preclude the United States from procedurally barring Breard's claim. *Id.*[21]

Since the *Breard* order, however, the legal universe has fundamentally changed. In its 2001 *LaGrand* Judgment, the International Court expressly held, *first*, that, as this Court had suggested, the Vienna Convention conferred rights on the individual national as well as the sending State, and *second*, that the application of the procedural default doctrine to bar a Vienna Convention claim when the receiving State had failed in its obligation to advise the foreign national of his or her Vienna Convention rights, constituted a violation of Article 36(2) of the Convention. *LaGrand* Judgment, paras. 77, 90-91. Needless to say, this Court did not have the benefit of those specific holdings on the interpretation and application of the Vienna Convention when it made its more general observations in the *Breard* order.

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[20] By the *Breard* order, the Court denied four discretionary applications (two petitions for certiorari, an application for a bill of original complaint, and an application for an original writ of *habeas corpus*), on the eve of an execution, without full briefing and oral argument, in carefully couched language. The opinion thus has limited precedential value. *See, e.g., Teague v. Lane*, 489 U.S. 288, 296 (1989) ("[O]pinions accompanying the denial of certiorari cannot have the same effect as decisions on the merits."); *United States Bancorp Mortg. Co. v. Bonner Mall Pshp.*, 513 U.S. 18, 24 (1994) (noting the Court's "customary skepticism toward *per curiam* dispositions that lack the reasoned consideration of a full opinion" even when issued on the merits).

[21] In the *Breard* order, this Court also suggested that the section of the Antiterrorism and Effective Death Penalty Act of 1996, Pub L. No. 104-132, 110 Stat. 1214 (1996) ("AEDPA"), now codified at 28 U.S.C. §2254(e)(2) (2002), would have barred review of Breard's conviction and sentence as later-in-time federal law. *Breard*, 523 U.S. at 326. That issue does not affect this petition, however. Unlike Breard, Petitioner Medellin raised his Vienna Convention claim in state post-conviction proceedings, filed an affidavit in support of the claim, and requested an evidentiary hearing, which the state court denied. Under these circumstances, section §2254(e)(2) does not bar a federal evidentiary hearing on Mr. Medellin's claim. *See, e.g., Mason v. Mitchell*, 320 F.3d 604, 621 n.6 (6th Cir. 2003) (§2254(e)(2) does not apply where petitioner sought but was denied state court evidentiary hearing); *Morris v. Woodford*, 229 F.3d 775, 781 (9th Cir. 2000), *cert. denied*, 532 U.S. 1075 (2001) (same). Presumably for that reason, respondent state officials did not raise, and the Fifth Circuit had no occasion to decide, any issues concerning section 2254(e)(2). Even if that provision might somehow prove relevant in the future, moreover, it would remain the case that the issues that the Fifth Circuit *did* decide will be faced again and again by both state courts (which would be bound by the Supremacy Clause to apply *Avena* and would remain unaffected by any restriction on federal courts imposed by AEDPA) and federal courts (which would have to decide the questions presented here before reaching any alleged AEDPA bar). Finally, Petitioner respectfully submits that if provided full briefing and argument, the Court would hold, in accord with *Murray v. Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804), that the Congress that enacted section 2254(e)(2) did not intend the United States to breach its treaty obligation to abide by the Vienna Convention, the Optional Protocol, and the *Avena* Judgment.

In the *Avena* Judgment, the International Court of Justice reiterated both of those holdings. Moreover, it did so in a case that *adjudicated Petitioner Medellin's own rights.* Specifically, the Court held that the United States had violated Article 36(1) of the Convention by failing to afford Mr. Medellin the opportunity to secure the assistance of the Mexican consul, and that under Article 36(2), the United States courts could not apply the procedural default doctrine to avoid assessing on the merits the impact of the violation on the proceedings that led to his conviction and sentence. *See Avena* Judgment, paras. 128-134, 140 (257A-260A, 263A).

The Court of Appeals expressly acknowledged the holdings of *LaGrand* and *Avena*, and it fully appreciated their import. It concluded, however, that existing precedent, including the *Breard* order, prevented it from complying with *LaGrand* and *Avena.* 131A-134A. This Court should grant the petition in order to resolve no less than three conflicts reflected in the decision of the Court of Appeals.

First, the Court should grant the petition in order to resolve the conflict between, on the one hand, the common holdings of *Breard*, *LaGrand*, and *Avena* that the Vienna Convention creates individually enforceable rights and, on the other, numerous United States courts' holdings to the contrary. On this issue, the Fifth Circuit held itself precluded from applying the holdings of *LaGrand* and *Avena* by prior precedent, this time its own. 133a (5th Cir. 2004) (applying *United States v. Jimenez-Nava*, 243 F.3d 192,195-98 (5th Cir. 2001)).

The Fifth Circuit is not alone. While at least one District Court has recognized an individually enforceable right,[22] at least four other Courts of Appeals and numerous other federal and state courts have concluded that Article 36 does not create such a right.[23] That conclusion is contradicted not only by the express holdings of *LaGrand* and *Avena*, but by this Court's own suggestion in *Breard*.

Second, the Court should resolve the conflict between this Court's order in *Breard* and the holdings of the International Court of Justice in *LaGrand* and *Avena* on the issue of whether Article 36(2) precludes the application of procedural default doctrines when the United States has itself failed in its obligation of notification. On this issue, the Fifth Circuit stated flatly that *LaGrand* and *Avena* "contradict" the *Breard* order. 132A. It held, however, that it did not have the authority to "disregard the Supreme Court's clear holding that ordinary procedural default rules can bar Vienna Convention claims." *Id.* It believed itself bound to follow that decision "until taught otherwise by the Supreme Court." *Id.*

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[22] *See Standt v. City of New York*, 153 F. Supp. 2d 417, 427 (S.D.N.Y 2001) (finding that the Vienna Convention affords a private right of action to individuals).

[23] *See United States v. Pineda*, 57 Fed. Appx. 4, 6-7 (1st Cir. 2003) (unpublished); *United States v. Duarte-Acero*, 296 F.3d 1277, 1281-82 (11th Cir. 2002); *United States v. Emuegbunam*, 268 F.3d 377, 392 (6th Cir. 2001); *United States v. De La Pava*, 268 F.3d 157, 164-65 (2d Cir. 2001); *Gordon v. State* 863 So. 2d 1215, 1221 (Fla. 2003); *State v. Martinez-Rodriguez*, 33 P.3d 267, 274 (N.M. 2001); *Cauthern v. State*, No. M2002-00929-CCA-R3-PD, 2004 Tenn. Crim. App. LEXIS 149, *144-48 (Tenn. Crim. App. 2004); *State v. Flores*, No. 01-3322, 2004 Wisc. App. LEXIS 446, *4-5 (Wis. Ct. App. May 26, 2004); *see also Mendez v. Roe*, 88 Fed. Appx. 165, 167 (9th Cir. 2004) (unpublished) (Vienna Convention claim not cognizable on federal habeas petition "because no clearly established federal law directs that Article 36's consular access provision institutes a judicially enforceable right"); *United States v. Nambo-Barajas*, No. 02-195(2), 2004 U.S. Dist. Lexis 6422, at *7-8 (D. Minn. Apr. 13, 2004) ("Eighth Circuit has not recognized an individually-enforceable right under article 36(b) of the Vienna Convention.").

Again, the Fifth Circuit is not alone. While at least one District Court has applied *LaGrand*,[24] at least five other Courts of Appeals and numerous other federal and state courts have concluded that the *Breard* order precludes them from following *LaGrand* or have simply ignored *LaGrand*.[25]

Finally, the Court should grant the petition in order to resolve the conflict between the Fifth Circuit and the Oklahoma Court of Criminal Appeals on the issue of whether the adjudication in *Avena* of a Mexican national's own rights must be given effect in the United States courts notwithstanding any inconsistent United States precedent. The Fifth Circuit failed to perceive a difference between *LaGrand*, in which the International Court of Justice addressed the Vienna Convention in a case that was binding only between Germany and the United States, and *Avena*, in which, after adjudicating Mr. Medellin's own rights, the Court gave a judgment that required the United States to take specific steps in his case. 131A-133A. By contrast, in *Torres v. Oklahoma*, 142A-163A, the Oklahoma Court of Criminal Appeals recently recognized that prior precedent cannot control in the case of a Mexican national subject to the *Avena* Judgment.

In *Torres*, the Court stayed the execution of a Mexican national subject to the *Avena* Judgment and, in accord with that Judgment, remanded the matter for an evidentiary hearing to determine the prejudice resulting from the Vienna Convention violation. Though the *Torres* order did not set forth the Court's reasoning, the concurring and dissenting opinions make it clear that, but for the *Avena* Judgment, the Court would have held the Vienna Convention claim procedurally defaulted.[26] 142A-163A. However, as Judge Chapel stated in a concurring opinion, and the majority presumably recognized, "this Court is bound by the Vienna Convention and Optional Protocol" and hence required to give full effect to the *Avena* decision. 147A, 150A. Thus, although the Oklahoma Court's own precedent would have required that it disregard *LaGrand* in favor of *Breard*'s treatment of procedural default, the Oklahoma Court was now bound to follow, as a matter of federal law, the holding in the *Avena* Judgment that Torres's Vienna Convention claim could not be procedurally barred. 153A & n.21.

By the *Avena* Judgment, the International Court of Justice determined the rights of 49 Mexican nationals in addition to Messrs. Torres and Medellin. Thus, in 49 more cases, United States courts will face the question on which the Court of

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[24] *See United States ex rel. Madej v. Schomig*, 223 F.Supp.2d 968 (N.D. Ill. 2002) (*LaGrand* forecloses strict reliance on procedural default doctrine for Convention violations).

[25] *See, e.g., Villagomez v. Sternes*, 88 Fed. Appx. 100, 101 (7th Cir. 2004) (unpublished) (without referring to *LaGrand*, holding Vienna Convention claim procedurally defaulted); *United States v. Nishnianidze*, 342 F.3d 6, 18 (1st Cir. 2003) (same); *Gulertekin v. Tinnelman-Cooper*, 340 F.3d 415, 426 (6th Cir. 2003) (same); *Drakes v. INS*, 330 F.3d 600, 606 (3d Cir. 2003) (same); *United States v. Sanchez*, 39 Fed. Appx. 10, 11 (4th Cir. 2002) (unpublished) (same); *Mckenzie v. Dep't of Homeland Security*, No. 3:04cv0067, 2004 U.S. Dist. LEXIS 7041, at *6-8 (D. Conn. Apr. 23, 2004) (same); *Nambo-Barajas*, 2004 U.S. Dist. Lexis 6422, at *9 (same); *Gordon v. State*, 863 So. 2d 1215, 1221 (Fla. 2003) (same); *State v. Escoto*, 590 S.E.2d 898, 906 (N.C. Ct. App. 2004) (same); *Valdez v. State*, 46 P.3d 703, 709 (Okla. Crim. App. 2002) (acknowledging *LaGrand*, but holding, in light of *Breard*, Vienna Convention claim procedurally defaulted). *See also Plata v. Dretke*, No. 02-21168, slip op. (5th Cir. Aug. 16, 2004) (denying certificate of appealability in post-*Avena* case).

[26] Hours after the Court of Criminal Appeals ruled, Governor Brad Henry commuted Mr. Torres's sentence to a term of life without parole, stating "[u]nder agreements entered into by the United States, the ruling of the ICJ [in *Avena*] is binding on U.S. courts." Press Release, Office of Governor Brad Henry, *Gov. Henry Grants Clemency to Death Row Inmate Torres* (May 13, 2004), http://www.governor.state.ok.us/display_article.php?article_id= 301&article_type=1.

Appeals here and the Oklahoma Court of Criminal Appeals split – whether *Avena*'s adjudication of the Article 36 rights of individual Mexican nationals must be given effect in United States courts notwithstanding the *Breard* order or any other inconsistent United States authority.

Each of these issues will be faced again and again by both state and federal courts addressing applications by other Mexican nationals whose rights have been adjudicated in *Avena* and other foreign nationals seeking to invoke the authority of *Avena* and *LaGrand*. This Court should grant the petition in order to resolve the disabling conflicts over the proper legal rule and thereby free United States courts from the straightjacket that, they erroneously believe, requires them to breach the solemn promises made by this country's elected representatives in the Vienna Convention and its Optional Protocol. *See Tennard v. Dretke*, 124 S.Ct. 2562, 2569 (2004) (correcting the legal standard on certiorari review of denial of a COA); *Miller-El v. Cockrell*, 537 U.S. 322, 341 (2003) (same).

III. The Court Should Grant the Petition To Ensure International Judicial Comity and Uniform Treaty Interpretation.

Even if the *Avena* Judgment did not constitute an adjudication of Mr. Medellin's own rights to which United States courts are obligated to give effect as a matter of both international and United States law, the International Court's rulings in *LaGrand* and *Avena* should be given effect in the interest of international comity and uniform treaty interpretation.

A. The Court Should Grant the Petition in the Interest of International Judicial Comity.

This Court has long promoted the goal of comity between the courts of different nations. *See, e.g.*, *Hilton v. Guyot*, 159 U.S. 113, 164 (1895). In a world of enormous economic interdependence and regular international travel and migration, the courts of more than one nation will frequently have jurisdiction to address disputes arising from any given course of events. RESTATEMENT (THIRD) FOREIGN RELATIONS § 421 (1987). As a result, our courts will frequently have occasion to accord respect to proceedings in another State's courts. That respect can take a variety of forms, including the recognition of a foreign judgment, *see Hilton*, 159 U.S. at 164; forbearance from adjudicating a given case in favor of more efficient proceedings before the courts of a foreign country, *see Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 n.22, 257-61 (1981); forbearance from exercising jurisdiction in recognition of the greater interest of a foreign country, *see Hartford Fire Ins. Co. v. Cal.*, 509 U.S. 764, 818-19 (1993) (Scalia J., dissenting); and forbearance from interference by antisuit injunction with proceedings in the courts of another country, *see Gau Shan Co. v. Bankers Trust Co.*, 956 F.2d 1349, 1354-55 (6th Cir. 1992). *See also Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 629 (1985) (enforcing agreement to arbitrate before foreign arbitral tribunal); *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 8-9 (1972) (enforcing agreement to litigate before foreign court).

This "comity of courts" cannot be confined to the judgments and proceedings of national courts. As many have remarked, the subject matter and frequency of international adjudication continue to expand. *See, e.g.*, Dietmar Prager, *The Proliferation of International Judicial Organs*, *in* PROLIFERATION OF INTERNATIONAL ORGANIZATIONS 279 (Niels M. Blokker et al., eds., 2001). As individual States continue to entrust the resolution of specific categories of disputes to international tribunals, national courts will need to extend the same respect to those tribunals.

This case presents the most compelling opportunity possible for according judicial comity to the ruling of an international tribunal. Not only has the United States agreed to the jurisdiction exercised by the International Court of Justice, the most important court in the international legal system, but that Court, in rendering its judgment, has itself sought to engage the United States courts in a collaborative judicial enterprise. Specifically, though that Court had jurisdiction to grant Mexico's request for annulment of the convictions and sentences, *see Avena* Judgment, para. 119 (252A-253A), it chose not to do so. Instead, the Court ordered that the United States courts themselves conduct review and reconsideration of the convictions and sentences tainted by the violations, in accord with the criteria laid down in the judgment, and then fashion relief for any prejudice. *Id.*, para. 153(9) (274A).

"If an international tribunal recognizes the importance of the national courts of the countries within its jurisdiction as enforcers of its decision, it is inviting a kind of judicial cooperation that melds the once distinct planes of national and international law." Anne Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT'L L.J. 191, 194 (2003); *see also* Anne Marie Slaughter, *Court to Court*, 92 AM. J. INT'L L. 708 (1998). This Court should accept that invitation by granting the petition to ensure compliance by United States courts with the "authoritative interpretation of Article 36" pronounced in the *LaGrand* and *Avena* Judgments. *Torres v. Mullin*, 124 S. Ct. 919, 919 (2003) (Stevens, J.).

B. This Court Should Grant the Petition to Ensure Uniform Interpretation of a Multilateral Treaty.

The parties to a treaty should be presumed to intend a uniform interpretation in all jurisdictions in which the treaty may apply. *Olympic Airways v. Husain*, 124 S. Ct. 1221, 1232 (2004) (Scalia, J., dissenting). Here the United States and some 44 other signatories to the Convention also agreed to submit disputes concerning the interpretation and application of the treaty for binding adjudication by the International Court of Justice. Surely those parties' agreement to that single forum strengthens the presumption that the parties were looking for a consistent interpretation of the treaty provisions. It follows that a State party to the Vienna Convention should defer to the interpretation of the Convention by that Court – especially, needless to say, when that State is not only party to the Convention, but party to the very case in which the Court issued the interpretation.

Again, the *Avena* Judgment confirms that the International Court recognized its own responsibility to ensure uniform interpretation of the treaty. The Court stated that it had approached the case "from the viewpoint of the general application of the Vienna Convention" and advised that its interpretation and application of the Convention would apply in any future cases between parties to the Convention. *See Avena* Judgment, para. 151 (269A-270A). Again, therefore, this Court should reciprocate by granting the petition in order to ensure that United States courts abide by the Court's authoritative interpretation of the Convention.

CONCLUSION

The Court should grant the petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

Dated: New York, New York
August 18, 2004

Respectfully submitted,

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No. __-__

IN THE

Supreme Court of the United States

◆

JOSE ERNESTO MEDELLIN,

Petitioner,

—v.—

DOUG DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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MANDATE FROM
COURT OF CRIMINAL APPEALS
Austin, Texas

THE STATE OF TEXAS,
TO THE 339TH JUDICIAL DISTRICT COURT OF HARRIS COUNTY - GREETINGS:

Before our COURT OF CRIMINAL APPEALS, on the 30th day of April A.D. 1997 the cause upon appeal to revise or reverse your Judgment between

JOSE ERNESTO MEDELLIN,

—vs.—

THE STATE OF TEXAS,

CCRA No. 71,997
Tr. Ct. No. 675430

was determined: and therein our said COURT OF CRIMINAL APPEALS made it's order in these words:

"This cause came on to be heard on the transcript of the record of the Court below, and the same being considered, because it is the Opinion of this Court that there was no error in the judgment, it is **ORDERED, ADJUDGED AND DECREED** by the Court that the judgment be **AFFIRMED**, in accordance with the Opinion of this Court, and that the appellant pay all costs in this behalf expended, and that this Decision be certified below for observance."

The Appellant's Motion for Rehearing is Denied.

WHEREFORE, We command you to observe the Order of our said **COURT OF CRIMINAL APPEALS** in this behalf and in all things have it duly recognized, obeyed and executed.

WITNESS, THE HONORABLE MICHAEL J. MCCORMICK, Presiding Judge

of our said **COURT OF CRIMINAL APPEALS**, with the Seal
thereof annexed, at the City of Austin,
this 16th day of May A.D. 1997.
TROY C. BENNETT, JR., Clerk
BELVA MYLER, Deputy Clerk

Appeal from HARRIS County
NO. 71,997

JOSE ERNESTO MEDELLIN,
Appellant

—V.—

THE STATE OF TEXAS,
Appellee

OPINION

Appellant, Jose Ernesto Medellin, was convicted in September of 1994 of a capital murder committed in June of 1993. TEX. PENAL CODE ANN. §19.03(a)(2). Pursuant to the jury's answers to the special issues set forth in Texas Code of Criminal Procedure art. 37.071 §§ 2(b) and 2-(e), the trial judge sentenced appellant to death.[1] Article 37.071 § 2(g). Direct appeal is automatic. Article 37.071 § 2(h). We will affirm.

Appellant raises nine points of error, including challenges to the sufficiency of the, evidence at both stages of trial. In his first point of error, appellant asserts that this cause should be abated and remanded to the trial court for the trial judge to enter written findings of fact and conclusions of law regarding the outcome of a hearing on the voluntariness of appellant's confession as required by Article 38.22 § 6 of the Texas Code of Criminal Procedure. Because this has been done, appellant's first point of error is now moot.[2]

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[1] Any subsequent references to Articles are to those in the Texas Code of Criminal Procedure unless otherwise indicated.

A recitation of the facts will be helpful in addressing the remaining points of error. Looking at the evidence in the light most favorable to the jury's verdict, the record reveals the following facts: On the night of June 24, 1993, a gang called the "Black and Whites" had come together to initiate a new member, Raul Villareal. The other gang members present were appellant, Peter Cantu, Roman Sandoval, Efrain Perez, and Sean O'Brien. Roman's brother, Frank, and appellant's fourteen-year-old brother, Venancio, were also tagging along. The initiation involved fighting each member of the gang for a five to ten minute period. After the fighting was over, Raul was welcomed into the gang.

Meanwhile, fourteen-year-old Jennifer Ertman and sixteen-year old Elizabeth Pena were visiting a girlfriend. Around 11:15 p.m., Jennifer and Elizabeth decided to head for their respective homes by way of a shortcut across the railroad tracks. Jennifer and Elizabeth first encountered Roman and Frank as they made their way home, but managed to pass the brothers without incident. However, as they passed appellant, he attempted to engage Elizabeth in conversation. When Elizabeth tried to run from appellant, he grabbed her and threw her to the ground. Elizabeth screamed for Jennifer to help her. In response to her friend's cries, Jennifer ran back to help, but Peter and Sean grabbed her and threw her down as well. At this point, the Sandoval brothers decided that it was time to leave.

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[2] This cause was abated on May 8, 1996, pursuant to Tex. R. App. Proc. 40(b)(2). *See Green v. State*, 906 S.W.2d 937 (Tex. Crim. App. 1995). The requested findings of fact and conclusions of law were thereafter forwarded to this Court. The trial court having complied with our order, we now continue the appeal of this cause.

Subsequent boastful statements of appellant and other gang members revealed that what ensued was a brutal gang rape of both of the girls. After the girls were thrown to the ground, the gang members orally, vaginally, and anally raped both of them. After the assault, appellant, Raul, Efrain, and Peter regrouped at Peter's house where he lived with his brother and sister-in-law, Joe and Christina Cantu, to brag about their exploits. Christina noticed that Raul was bleeding and that Efrain had blood on his shirt. She asked the group what had occurred and appellant responded that they "had fun" and that their exploits would be seen on the television news. Appellant was hyper, giggling, and laughing. He boasted to Joe and Christina that the group had met two "hos" [sic] and had sex with them. He also told the couple that two girls had been talking to them and that he punched one of the girls because she had started screaming after he grabbed her.

Appellant related to Joe and Christina that he sexually assaulted one of the girls and bragged about having "opened" her since she had apparently been a virgin. As if to accentuate his conquest, appellant showed Christina his blood soaked underwear. Appellant related that after another gang member sexually assaulted the second girl, he "turned her around" and anally raped her. Appellant also bragged of having forced both girls to engage in oral sex with him. Peter joined the group shortly thereafter and began to divide up the money and jewelry that had been taken from the two girls. Peter gave appellant a ring with an "E" design on it so that he could give it to his girlfriend, Esther.

When Christina asked the group what happened to the girls, appellant told her that they had been killed so that they could not identify their attackers. Appellant then elaborated that it would have been easier with a gun, but because they did not have one at the scene of the incident, he took off one of his shoelaces and strangled at least one of the girls with it.[3] Both Joe and Christina noted that appellant complained of the difficulty group encountered in killing the girls. After appellant related the difficulty he encountered in strangling one of the girls, he said that he put his foot on her throat because she would not die.

Christina subsequently convinced her husband to report the incident to the police. By the time the bodies were discovered, they were so badly decomposed that dental records were required to identify them. However, enough tissue remained for the medical examiner to determine that each girl had died of a trauma to the neck consistent with strangulation.

Eventually, all of the individuals who participated in the rapes and murders were apprehended. After appellant was arrested, he gave a written and then an oral, tape-recorded statement, the latter of which was never offered into evidence at trial. In the written statement, appellant admitted to having had oral sex with Elizabeth, but commented that he only peripherally participated in her murder.

At the punishment stage of trial, appellant's parents testified that appellant had been a good student and had made good grades until he entered the sixth grade. After that point, appellant's behavior deteriorated rapidly. Appellant was suspended from middle school in the Fall

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[3] Apparently all of the gang members were talking about having killed the two girls which resulted in some degree of confusion on the part of the witnesses. However, Christina testified that she understood appellant to have said that he personally participated in killing both of the girls, while Joe testified that he understood appellant to have said that he strangled one of the girls while his companions killed the other girl.

of 1990 for "misconduct and repeated misbehavior." In high school, appellant was well known to administrators due to his repeated disciplinary violations. In January of 1992, appellant was restrained by an assistant principal from attacking another student. Furthermore, appellant repeatedly threatened to kill the assistant principal and to "fix it" so that he could not father any more children. Appellant told the assistant principal that life meant nothing to him. (appellant) and that someday he would be featured on television or the front page of the newspaper as the result of having killed someone, "probably a cop." In October of 1992, appellant was involved in a gang related fight at school which resulted in his expulsion from school and subsequent placement at an alternative school.

Appellant was also known to the police. In January of 1992, police were called to a restaurant in response to a disturbance call involving a terroristic threat. When initially confronted by police, appellant refused to stop or to remove his hand from his pocket. He was later found to have a .38 caliber pistol concealed in his pocket. In June of 1993, appellant was found at the emergency room of a Houston hospital where Efrain Perez was being treated for a gunshot wound. Testimony from an employee of the hospital regarding a conversation the employee overheard between appellant and co-defendant Cantu indicated that the two knew who had shot Perez and that they were going to go after that individual themselves. When a police officer arrived to investigate the shooting, appellant was belligerent and uncooperative.

While appellant was in jail awaiting trial on the instant offense, a search of appellant's cell turned up a "shank"[4] which had been fashioned from a disposable razor. Another search of appellant's cell a year later, the day before punishment arguments were to be heard in the instant case, turned up another "shank" in the making.

I. SUFFICIENCY OF THE EVIDENCE

Appellant asserts in his sixth point of error that the evidence was legally insufficient to support the jury's guilty verdict. In reviewing the sufficiency of the evidence, this Court reviews all of the evidence in the light most favorable to the verdict to determine whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307 (1979). Appellant concedes that sufficient evidence exists to prove his participation in the underlying offenses to the capital murder. However, appellant takes issue with the sufficiency of the evidence to prove his specific intent to commit the offense of murder. He contends the evidence supporting this intent, the testimony of Joe and Christina Cantu, was more accurately attributable to appellant's co-defendants than to appellant.

A review of the testimony of both Christina and Joe Cantu shows that they did indeed attribute many statements about the deaths of the two victims to the generic "they" encompassing the whole group. However, each witness also testified to statements attributed only to appellant. Specifically, Christina testified that appellant told her he killed the victims. In fact, she stated that appellant said that he took turns killing both of the girls. Christina commented that appellant told her that "he took off his shoelace and strangled one of the girls."

Christina also told the jury that appellant related to her that he put his foot on one of the girl's throats, and she testified that appellant "said it would have been faster if he had a gun to kill them." When Joe Cantu was asked if he remembered specifically what appellant told him about the killing, Joe responded that appellant had told him that appellant strangled one of the victims from the back and when she didn't look like she was dead, he started stomping on her. Joe also testified that appellant commented that it would have been easier with a gun.

Given the totality of the evidence, we hold that a rational trier of fact could have found appellant guilty of the offense of capital murder beyond a reasonable doubt. Point of error number six is overruled.

In his seventh point of error, appellant posits that the evidence was insufficient to support the jury's affirmative answer to the issue on whether appellant would be a continuing danger. Article 37.071 § 2(b)(1). In reviewing whether the evidence is sufficient to support the jury's affirmative finding on the issue of future dangerousness, this Court looks at the evidence in the light most favorable to the verdict to determine whether any rational trier of fact could have believed beyond a reasonable doubt that "there is a probability that (appellant] would commit criminal acts of violence that would constitute a continuing threat to society." Article 37.071 § 2(b)(1); *Jackson v. Virginia*, 443 U.S. 307 (1979); *Allridge v. State*, 850 S.W.2d 471 (Tex. Crim. App. 1991), *cert. denied*, ___ U.S. ___, 114 S.Ct. 101 (1993). The facts of the crime alone can be sufficient to support the affirmative finding to the special issue. *Allridge, supra*. In fact, the circumstances of the crime may provide greater probative evidence of a defendant's probability for committing future acts of violence than any other factor relevant to the second special issue. *Id.*

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[4] A "shank" was described as a type of homemade or jailmade knife.

At trial, the jury is permitted to look at several factors in its review of future dangerousness including, but not limited to:

1. the circumstances of the capital offense, including the defendant's state of mind and whether he was acting alone or with other parties;
2. the calculated nature of the defendant's acts;
3. the forethought and deliberateness exhibited by the crime's execution;
4. the existence of a prior criminal record, and the severity of the prior crimes;
5. the defendant's age and personal circumstances at the time of the offense;
6. whether the defendant was acting under duress or the domination of another at the time of the offense;
7. psychiatric evidence; and
8. character evidence.

Barnes v. State, 876 S.W.2d 316, 322 (Tex. Crim. App.), *cert. denied*, ___ U.S. ___, 115 S.Ct. 174 (1994); *Keetnon v. State*, 724 S.W:2d 58, 61 (Tex. Crim. App. 1987) ("Keeton I"). These factors are also helpful in this Court's evaluation of this question.

The facts of the instant case are brutal and barbaric enough to alone support the jury's answer to the special issue. The instant scenario began with underage drinking and fighting as a gang initiation rite. When the two victims came into the picture, appellant not only took full part in violently raping both of them and killing at least one of them, but appears to have initiated those actions.

In contrast to showing remorse afterward, appellant laughed about the incident, referred to the girls in derogatory terms, and enjoyed the spoils of the group's perceived conquest.

In addition, appellant has a history of misconduct and violent misbehavior both in school and out, with repeated suspensions, expulsions, and arrests dating back to the sixth grade. He has a history of threatening individuals with bodily harm or death and a history of being found in possession of a firearm. Before his imprisonment, appellant chose to spend his social hours with a group of young men who engaged in illegal drinking and violent behavior. After being imprisoned, appellant continued to associate himself with weapons.

Given the totality of the evidence, we hold that a rational trier of fact could have believed beyond a reasonable doubt that "there is a probability that [appellant] would commit criminal acts of violence that would constitute a continuing threat to society," whether in prison or out. Point of error seven is overruled.

II. VOIR DIRE

Appellant complains in his third point of error that the trial court erred in granting the State's challenge for cause to venireperson R. L. Mackey pursuant to her views concerning the death penalty. The State contends the trial court did not abuse its discretion in granting the challenge for cause because the veniremember's attitude about the death penalty would have prevented or substantially impaired the performance of her duties as a juror in accordance with her oath and the instructions of the court. *See Wainwright v. Witt*, 469 U.S. 412 (1985); *Coleman v. State.*, 881 S.W.2d 344, 347-48 (Tex. Crim. App. 1994), *cert. denied*, ___ U.S. ___, 115 S.Ct. 763

(1995). In reviewing such a point of error, we apply a deferential standard because the trial court was in the best position to evaluate the responses of the veniremember. *Coleman, supra*.

The record reveals the following pertinent exchanges:

> THE COURT: Do you have any conscientious, religious, moral, or philosophical scruples against the infliction of death as punishment in an appropriate case?
>
> [VENIREMEMBER:] No.
>
> [THE COURT:] You said no, you don't. So do you have any opposition to the death penalty?
>
> [VENIREMEMBER:] Religious beliefs. Thou shall not kill.
>
> [THE COURT:] Well, you're entitled to those; and nobody is going to disagree with you.
>
> * * *
>
> What we don't want is someone whose beliefs are so strong that when they take an oath to follow the law and render a true verdict according to that law, that it's going to do violence to their conscience.
>
> * * *
>
> So, [veniremember], only you know the answer to this question. Are your religious beliefs so strong that you could not follow the oath you would have to take as a juror and render a true verdict according to the law and the evidence and if the evidence called for it, vote in such a way that it would result in the death penalty?

> I know that's a mouthful. But did you understand the question? Might have been too long.
>
> [VENIREMEMBER:] I could follow the law; but, like I say, it's just my religious belief. The law says one thing, and the religious belief says another.
>
> [THE COURT:] Could you then participate with 11 other people in voting on these questions that we'll go over, in voting in such a way that you know would result in this defendant receiving a death sentence if the evidence called for it?
>
> [VENIREMEMBER:] If the evidence called for it, yes.
>
> * * *
>
> [THE STATE:] And when you filled out your questionnaire, you stated to Question 86 — . . . that: I'm opposed to capital punishment under any circumstances.
>
> Okay. Now, I take it, if you marked that, you had a reason for marking it, correct?
>
> [VENIREMEMBER:] Yes, I did.
>
> [THE STATE:] That's what you believe?
>
> [VENIREMEMBER:] Uh-huh.
>
> * * *
>
> [THE STATE:] In response to . . . Question No. 12, you said: I do not believe in capital punishment under any circumstance; and you checked that "disagree."
>
> And then in response to 89, you said you don't want to be a juror in this case because of your religious background, you don't think that you could.

[VENIREMEMBER:] Uh-huh, that's what I stated.

[THE STATE:] Followed by 90 that states: My Bible tells us thou shall not kill and this is my belief.

* * *

And if you were seated on this jury with those conflicts that you are having — I'm evidencing right now that perhaps you are having some conflict about this. Am I correct?

[VENIREMEMBER:] If — if — if — yes.

[THE STATE:] And only if I'm correct, ma'am. Certainly. Nobody is here to try to persuade you or make you participate in this. This is fully one where you have an opportunity to say: No; that if I was called upon to participate in this trial, that my belief would substantially impair me from participating and returning a verdict of death in this case even if it was the right thing to do because of my religious belief.

Is that the way you feel?

[VENIREMEMBER:] Yes.

[THE STATE:] And you understand that I'm just a mere mortal man. I don't think I have the power of persuasion and [ability to] cloud your mind like the shadow could and get you to do my deed in light of your religious belief. And if you were selected on this jury, you would be more inclined to try to find a way, if you did end up on this jury, in some manner or form, you would try to find a way to come up with a life sentence, would you not, if you were put in that box?

[VENIREMEMBER:] That's correct.

* * *

[THE STATE:] To be a juror would substantially impair you from carrying out the law, following the law in this case, because of your religious belief?

You answered yes to that at one time.

[VENIREMEMBER:] The reason I said yes is I have just retired. And I worked with children, young adults, and I worked with young adults which have cancer. And my daughter died of cancer and that has a total thing with me for — I would say just to be in the situation like this, so I would rather not.

[THE STATE:] Well, one of the magic words, we have to have you say on the record. If it would substantially impair you from doing your duty as a juror, then you've met the qualification under the law to be discharged.

Would it substantially impair you —

[VENIREMEMBER:] Yes, it would.

Upon continued questioning by the parties and the court, the veniremember continued to express her feelings that she did not want to participate on this jury and that she would be inclined to answer the punishment questions in such a way that appellant would receive a life sentence. Given the totality of the voir dire, we cannot say that the trial court abused its discretion in sustaining the State's challenge for cause to the veniremember. *Coleman, Supra; see also Staley v. State,* 887 S.W.2d 885 (Tex. Crim. App. 1994). Point of error three is overruled.

In his fourth point of error appellant claims the trial court erred in overruling his *Batson*[5] and Article 35.261[6] challenges to the State's peremptory strike of venireperson R. Rodriguez. The record reveals that after the State exercised its peremptory strike on the venireperson, appellant stated, "we'll make a Batson challenge." Nowhere did appellant invoke the application of Article 35.261 or move for a dismissal of the array. Furthermore, appellant has not separately argued the protection of 35.261 in his brief. Hence, we find any complaint as to Article 35.261 has not been preserved for appellate review. *Camacho v. State*, 864 S.W.2d 524, 528 (Tex. Crim. App. 1993), *cert. denied*, __ U.S. __, 114 S.Ct. 1339 (1994); Tex. R. App. Proc. 52(a).

With regard to appellant's *Batson* claim, we stated in *Satterwhite v. State*, 858 S.W.2d 412, 423 (Tex.

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[5] *Batson v. Kentucky*, 476 U.S. 79 (1986).

[6] Article 35.261 prohibits the use of peremptory challenges on racial grounds. It reads in pertinent part:

> (a) After the parties have delivered their lists to the clerk under Article 35.26 of this code and before the court has impaneled the jury, the defendant may request the court to dismiss the array and call a new array in the case. The court shall grant the motion of a defendant for dismissal of the array if the court determines that the defendant is a member of an identifiable racial group, that the attorney representing the state exercised peremptory challenges for the purpose of excluding persons from the jury on the basis of their race, and that the defendant has offered evidence of relevant. facts that tend to show that challenges made by the attorney representing the state were made for reasons based on race. If the defendant establishes a prima facie case, the burden then shifts to the attorney representing the state to give a racially neutral explanation for the challenges. The burden of persuasion remains with the defendant to establish purposeful discrimination.

Crim. App.), *cert. denied*, ___ U.S. ___, 114 S.Ct. 455 (1993):

> In order to invoke the protections set forth in *Batson*, appellant must first raise an inference of purposeful discrimination through the State's use of its peremptory strikes. Once appellant has established such purposeful discrimination, the burden of production shifts to the prosecutor to come forward with racially neutral explanations for the strikes. Once the prosecutor has articulated racially neutral explanations, the burden shifts back to the defendant to persuade the trial court that the "neutral explanation" for the strike is really a pretext for discrimination. [Citations omitted.] This Court will reverse the trial court's resolution of a *Batson* issue only if the court's findings are found to be clearly erroneous.

In the complained-of instance, appellant made a *Batson* challenge and offered the veniremember's questionnaire as evidence. He noted that the veniremember stated that he could basically look at both sides and was generally in favor of the death penalty. After noting that this was a *Batson* claim and not a *Wainwright v. Witt* claim,[7] the trial court held that a prima facie case had been established. The prosecutor then gave the following race reasons for striking Rodriguez:

> My reason for striking Mr. Rodriguez is there was a great deal of hesitation with his explanation on the death penalty when he was speaking with you. He's also for the death penalty without any compulsion whatsoever if it happened to one of his relatives. I still do not have a full understanding of his position on the death penalty.

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[7] 469 U.S. 412 (1985)

> With respect to the question I asked him, he gave me a philosophical — he gave a theological and Biblical and his own philosophy. One of the things put me on edge, turning the cheek, you turning the other cheek. That goes back to the philosophy if you're slapped, you turn the other cheek.
>
> I'm afraid he may be looking to turn the other cheek in this case, and I don't want it turned in my favor.

The trial court accepted these reasons as race-neutral and appellant made no attempt to rebut the explanations given or otherwise explain why they were only pretexts for discrimination. A review of the entirety of the veniremember's voir dire reveals that the prosecutor's reasons were supported by the record. Given this, we cannot say that the judge's ruling in this instance was clearly erroneous. *See Satterwhite, supra*. Point of error four is overruled.

In his eighth and ninth points of error, appellant claims the trial court reversibly erred in granting school exemptions for prospective jurors M. L. Lambeth and P. S. Jolly. The August 11, 1994, voir dire of Lambeth revealed that the venireperson had recently graduated from Texas A & M University. However, she had also completed one semester of Nursing School. Furthermore, it was established that Lambeth was only on summer break and had already enrolled in and paid for nine hours of Nursing classes for the fall semester which would commence on August 29, 1994. Because her classes were scheduled to run every day of the week, and because the trial was not scheduled to begin until September 12, 1994, it was undisputed that the trial and the classes would conflict.

Tex. Gov't Code § 62.106 states that:

> A person qualified to serve as a petit juror may establish an exemption from jury service if he:
>
> * * *
>
> (4) is a person enrolled and in actual attendance at an institution of higher education[.]

Even if Lambeth was not properly excused under this section,[8] the judge properly excused her under Tex. Code of Crim. Proc. Article 35.03.[9] *See Butler v. State*, 830 S.W.2d 125, 131-132 (Tex. Crim. App. 1992); *Harris v. State*, 784 S.W.2d 5, 18-19 (Tex. Crim. App.1989) , *cert. denied*, 494 U.S. 1090 (1990).

Jolly's voir dire also established that while she was not in school at the time of her individual voir dire on August 10, 1994, she had registered and paid for college classes which she would attend, commencing August 29, 1994. Although Jolly testified that she might be able to make up the classes she would miss due to the trial, she was not sure about this and she did not want to get behind in her classwork. As with Lambeth, the trial judge excused the potential juror pursuant to Tex. Gov't Code § 62.106 as well as Tex. Code of Crim. Proc. 35.03. As with the previous point, we hold that, even if the trial court erred in excusing the veniremember pursuant to Tex. Gov't Code § 62.106, she was properly excused under Article 35.03. *See Butler, supra; Harris, supra.* Points of error eight and nine are overruled.

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[8] Appellant contends that she was not properly excused pursuant to this section because she was not attending classes *at the time of voir dire*. However, we note that Gov't Code § 62.106 deals with "jury service" and not voir dire. In the instant case, the venireperson would be attending classes *at the time of "jury service."*

Appellant also contends under this point that Nursing School is a "technical" or "vocational" school and not an "institution of higher education." Given the disposition of the point of error, we need not address this contention here.

[9] Article 35.03 states in pertinent part:

> Sec. 1. Except as provided by Sections 2 and 3 of this article, the court shall then hear and determine excuses offered for not serving as a juror, and if the court deems the excuse sufficient, the court shall discharge the juror or postpone the juror's service to a date specified by the court.

III. ADMISSION OF EVIDENCE

Appellant contends in his second point of error that the trial court erred "in admitting into evidence the appellant's written custodial statement obtained after his unlawful arrest." Appellant notes that he was arrested pursuant to an arrest warrant. However, he states without authority or analysis that the affidavit for the warrant was insufficient on its face to provide probable cause to arrest appellant. Hence, he concludes, appellant's statement was the fruit of an illegal arrest and thus should not have been admitted at trial. Appellant then proceeds to argue why the taint from the arrest was not attenuated.[10]

Appellant seems to be complaining that because the affidavit on its face did not specifically tie appellant to the two bodies found, it was insufficient to support probable cause. We disagree. It is well-settled that, in determining the sufficiency of an affidavit for an arrest or search warrant, a reviewing court is limited to the "four corners of an affidavit." *Jones v. State*, 833 S.W.2d 118, 123 (Tex. Crim. App. 1992), *cert. denied*, 507 U.S. 921

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[10] Because appellant has given us nothing more than his conclusory statement that the affidavit was insufficient to show probable cause, he has inadequately briefed this point of error. Tex. R. App. Proc. 74(f). However, we have reviewed the affidavit in the interest of justice.

(1993). However, this determination is not meant "to place legalistic blinders on the process wherein a neutral and detached magistrate must decide whether there are sufficient facts stated to validate issuance of a proper warrant." *Id.* Rather, the warrant affidavit should be interpreted in a common sense and realistic manner and the reviewing magistrate is permitted to draw reasonable inferences from the information contained therein. *Id.*

The affidavit in the instant cause reads as follows:

> On June 28, [sic] 1993, your affiant [a homicide investigator employed by the Houston Police Department] personally went to a wooded area within the vicinity of West 34th St. and T. C. Jester in Houston, Harris County, Texas. At that location your affiant observed the bodies of two females, one of them was naked, and the other was partially unclothed and both appearing to have been dead for several days based upon the decomposition which had taken place on their bodies. The amount of decomposition which had taken place made the identification of the bodies by physical features difficult, if not impossible. The bodies were removed to the Harris County Morgue for complete autopsies and for dental analysis and comparison with the dental charts of two missing females, Jennifer Ertman and Elizabeth Pena.
>
> Your affiant is personally aware that a report had been made to the Houston Police Department that Jennifer Ertman and Elizabeth Pena had been reported missing since June 24, 1993. Your affiant has personally read Houston Police Department report number 66830993 which was prepared by R. L. Curl of the Houston Police Department and which states that on June 25, 1993, Randy Ertman

called the Department to state that his daughter, Jennifer Ertman and her friend, Elizabeth Pena were last seen walking from a friends house at approximately 11:00 P.M. on June 24, 1993 and that they said that they were going to take the short cut along the railroad tracks which are near T. C. Jester and West 34th and that they were going to go to Ertman's apartment. He reported that his daughter nor the other girl had been seen.

Your affiant is aware that an investigation had begun by the Houston Police Department in order to locate the two missing girls.

Your affiant is aware that on June 27, 1993 a man called the Houston Police Department dispatcher claiming to be Mr. Gonzalez [sic] and who told the dispatcher a possible location where the bodies of the two girls could be found. Your affiant is aware that officers of the Houston Police Department were sent to the location that "Mr. Gonzales" told them of and the officers were unable to locate their bodies.

On June 24, [sic] 1993, the same person called back claiming to be Mr. Gonzales and giving them a more specific location where the bodies could be located. He told the dispatcher that he had found the bodies himself and wanted to let the police department know. where the bodies were. On this occasion, your affiant personally went to the location as given to the dispatcher by "Mr. Gonzales" which was a wooded area near the intersection of T. C. Jester and West 34th St., Houston, Harris County, Texas. It was at this time that your affiant observed the bodies of the two girls.

Later on June 24, [sic] 1993, your affiant received information from officer Ken Weiner of the Houston Police Department Crime Stopper Division. He told your affiant that a female had called him telling him that her sister told her that her husband's, the caller's brother in law, brother had admitted to both her sister and her sister's husband that he and several other men had grabbed the two girls near the railroad tracks which run near the intersection of T. C. Jester and West 34th and that they raped and then killed the two girls. Weiner told your affiant that the caller left him her telephone number. Your affiant is personally aware that Officer Todd Miller of the Houston Police Department Homicide Division called the telephone number and spoke with veronica Barroso who told Miller that her sister and brother in law are Christina and Joe Adam Cantu and that they live at 1128 Ashland in Houston. She further said that Christina told her that her brother in law, Peter Cantu, and Joe Madellin both admitted to both her and her husband Joe Adam Cantu that they, along with some other men, saw the two girls walking down the railroad tracks near T. C. Jester and West 34th the night of June 24, 1993 and that they all grabbed the girls, raped them and then killed them.

Based upon the aforesaid, your affiant brought Joe Adam Cantu to the offices of the Houston Police Department Homicide Division on June 28, 1993 in order to talk with him about this information. Cantu gave a sworn affidavit to [Officer] Todd Miller in which he states, under oath, that in the early morning hours of June 25, 1993, his brother, Peter Cantu, who lives with him and his wife in the house on Ashland St. came into the house along with Efrin

Perez and another man whose name he did not know. He said that Peter, Efrin, Jose Madellin and the other man started telling him about two girls that they raped and killed in the woods near the railroad tracks near West 34th and T. C. Jester. They showed him jewelry that they had taken from the girls and they admitted raping the two girls and then killing them by strangling them and leaving the bodies out in the-woods. He then said that later a black male who he knows as Derrick Shawn O'Brien called his house and told him that he, too, had participated in the rapes and the murder of the two girls.

Your affiant has checked the records of the Houston Police Department and learned that Joe Adam Cantu has only one arrest for a Class C Misdemeanor ticket but that he has no other arrests and is going to school at this time and is close to graduating from the school.

As of the making of this affidavit your affiant has not learned from the Harris County Medical Examiner's Office as to the caused (sic] of death of either of the two girls. Further, your affiant is not aware that a positive identification has been made of the two bodies but, based upon all of the information that your affiant has gathered it is the opinion of your affiant that the two bodies that were found this morning are, in fact, the bodies of Jennifer Ertman and Elizabeth Pena.

Based upon the admissions which were made by the aforementioned Defendants to Cantu in which each of the men stated that they each raped the two girls and the fact that your affiant is personally aware, based upon years of experience as a Homicide investigator for the Houston Police Department, it is the opinion of your affiant that the DNA of each of the men who raped, the girls will be present in fluid samples extracted from the deceased girls during the autopsies. Further, by taking blood and saliva samples from each of the Defendants upon their arrest it will be possible for chemists to extract from those samples the known DNA of each Defendant and to then compare that with the DNA found from the autopsies of the two dead girls which will be evidence of the guilt of each defendant in these Capital Murder cases.

The affidavit contains facts which establish probable cause. In short, the affidavit states that two girls had disappeared on June 24, 1993, and were last known to be in a specific area of Houston that evening. Pursuant to a tip received by law enforcement personnel three days subsequent to the girls' disappearance, two female bodies were discovered in the same area in which the girls were last known to be. These bodies were determined to have been deceased for several days. In calling the telephone number left by the tipster, police officers located one Joe Cantu who told them, under oath, that his brother, appellant, and some others had come to his home in the early morning hours of June 25, 1993, claiming to have just raped and killed two girls in the precise area in which the two girls had last been placed and the two female bodies had been found.

Additionally, each individual cited within the affidavit is identified by name, and some are also identified by address. The majority of the facts contained in the affidavit were told either directly to the affiant, or to other law enforcement personnel. *Earhart v. State*, 823 S.W.2d 607, 631 (Tex. Crim. App. 1991), *vacated on other* *grounds*, ___ U.S. ___, 113 S.Ct. 3026 (1993)[11]; *Wilkerson v. State*, 726 S.W.2d 542 (Tex. Crim. App. 1986), *cert. denied*, 480 U.S. 940 (1987). Hence, we hold that the affidavit contained sufficient information with which a detached magistrate could have found probable cause. *Id.*

Because appellant was arrested pursuant to a lawful arrest warrant, the trial court did not err in denying appellant's motion to suppress his custodial statement.[12] Point of error two is overruled.

In supplemental points of error two-(A) through two-(E), appellant claims the trial court abused its discretion in determining his custodial statement was given intentionally, knowingly, and voluntarily, in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution; Article I, §§ 10 and 19 of the Texas Constitution; and Articles 38.22 and 38.23. Appellant briefs all of these contentions together. Appellate urges that we abandon our previous standard of reviewing voluntariness of a statement in favor of the standard set forth in *Clewis v. State*, 922 S.W.2d 126 (Tex. Crim. App. 1996). Appellant says that under this standard, we would have to conclude that the trial court abused its discretion in concluding his statement was voluntarily made.

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[11] *Earhart* was vacated by the United States Supreme Court and remanded to: this Court in light of *Johnson v. Texas*, 509 ___ U.S. ___, 113 S.Ct. 2658 (1993). The case was then reaffirmed by this Court. *Earhart v. State*, 877 S.W.2d 759 (Tex. Crim. App.), *cert. denied*, ___ U.S. ___, 115 S.Ct. 431 (1994).

[12] To the extent appellant may otherwise be complaining that his statement was not voluntarily given, he has not adequately set out the issue in a-separate point of error or properly briefed it. Therefore, any further claim as to appellant's statement will not be entertained here. Tex. R. App. Proc. 74(f).

At a hearing on a motion to suppress a defendant's statement, the trial court is the sole judge of the credibility of witnesses and the weight to be given their testimony. *Penry v. State*, 903 S.W.2d 715, 744 (Tex. Crim. App. 1995); *Romero v. State*, 800 S.W.2d 539, 543 (Tex. Crim. App. 1990). Therefore, if the record supports the trial court's findings, we will not disturb those findings. *Id.* On appeal, we only consider whether the trial court applied the law to the facts properly. *Id.* In *Clewis*, we held that courts of appeals have jurisdiction to review questions of fact, and in reviewing factual sufficiency of the elements of the offense, the court of appeals "should set aside the verdict only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust." 922 S.W.2d at 134-36.

We leave for another day whether we will extend *Clewis*.[13] Even if *Clewis* were applied to the facts of this case, appellant would not be entitled to relief. After giving his written statement, appellant gave a tape recorded statement to another officer. This tape recorded statement was not admitted into evidence and appellant does not question its legality. But appellant says the recording reflects that he asked for an attorney and that this is evidence that he had wanted an attorney at the time of his written statement. While the tape is not made a part of the record on appeal, the trial court made the following findings of fact regarding the taped conversation:

> Officer C.C. Abbondandolo . . . conducted an oral, taperecorded interview with the defendant.

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[13] *See German v. State*, No. 10-94-192-CR slip op. (Tex. App.-Waco July 5, 1995) (do not publish), *reh'g denied* (Aug. 2, 1995) (do not publish) *pet. granted* (PDR No. 1036-95 granted to determine whether great weight and preponderance of evidence standard for factual sufficiency applies to trial court's ruling on mixed questions of fact and law).

> Abbondandolo provided cigarettes to the defendant and arranged for him to be served a meal, but the defendant stated that he did not like the food and declined to eat it.
>
> Abbondandolo warned the defendant of his rights pursuant to art. 38.22, 5 2, supra, and *Miranda v. Arizona, supra*. The appellant asked if an attorney could be appointed immediately, and Abbondandolo responded that if he wanted an attorney at that time, they would have to terminate the interview.
>
> The defendant indicated that he desired to continue with the interview, and he voluntarily discussed the rape and murder . . .

The fact that appellant requested an attorney during his tape recorded statement does not render the trial court's conclusions as to the voluntariness of his previous written statement "so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust." It does not strain credibility to believe that a defendant might provide a written statement without invoking his right to an attorney, but change his mind while giving a second statement and request an attorney at that time. Appellant contends his request for an attorney during the taped conversation clearly indicates that he did not understand his rights at the time of the written statement. This, without more, does not follow. Therefore, even if a *Clewis* standard were applied here, which we expressly do not decide, appellant's claim would have no merit. Appellant's points of error two- (A) through two-(E) are overruled.

In his fifth point of error, appellant alleges the trial court erred in admitting into evidence scene and autopsy photographs of the two deceased victims because their probative value was far outweighed by their prejudicial

value in violation of Tex. R. Crim. Evid. 403. Appellant recognizes that this Court has held that a photograph is generally admissible where a verbal description of the same is admissible. *Long v. State*, 823 S.W.2d 259, 270 (Tex. Crim. App. 1991), *cert. denied*, 505 U.S. 1224 (1992). But, he maintains that, in the instant case, the photographs' prejudicial value substantially outweighed any probative value they may have had thus rendering them inadmissible. In his point of error, appellant refers to thirty-nine (39) different photographs, three (3) of which appear to be scene photographs with the remainder being autopsy photographs of the two different victims.

Of the three photographs depicting the crime scene, one shows both victims as their bodies appeared in relation to the surrounding environment. One of the remaining two photographs shows a close-up shot of one of the victims in the position in which she was found while the other photograph shows the second victim as she was found. Although these photographs are gruesome, they are highly probative in reflecting the nature and scene of the crime and the extent of some of the victims' injuries. *Barnes v. State*, 876 S.W.2d 316, 326 (Tex. Crim. App.), *cert. denied*, ___ U.S. ___, 115 S.Ct. 174 (1994).

With regard to the autopsy photographs, the medical examiner told the trial court that she needed all of the photographs to testify to the nature and extent of the injuries inflicted. While these photographs are also grotesque and depict extensive environmental deterioration of the subject pictured, they are probative in reflecting the nature of the crime in the context in which it occurred and the extent of some of the injuries. This visual evidence was also probative of the perpetrator's state of mind and intent during the commission of the crime due to the nature and extent of the injuries inflicted. Given the totality of the evidence, we cannot say that the trial court abused its discretion in finding that the prejudicial effect of the photographs, if any, did not outweigh their probative value. Point of error five is overruled.

Finding no reversible error, we affirm the judgment of the trial court.

MEYERS, J.

Delivered March 19, 1997
Do Not Publish
En Banc

Appeal from Harris County
NO. 71,997

JOSE ERNESTO MEDELLIN,
Appellant

—v.—

THE STATE OF TEXAS,
Appellee

CONCURRING OPINION

I concur in the result as to appellant's supplemental points of error, and otherwise join the opinion of the Court. However, I would directly address the merits of appellant's supplemental points of error and make clear to the, bench and bar that Clewis v. State, 922 S.W.2d 126 (Tex.Cr.App. 1996), has no application in reviewing a trial court's determination of a motion to suppress.

McCormick, Presiding Judge

(Delivered March 19, 1997)
En Banc
Do Not Publish

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

No. 50,191-01

EX PARTE JOSE ERNESTO MEDELLIN

HABEAS CORPUS APPLICATION FROM HARRIS COUNTY

The order was entered per curiam.

ORDER

This is an application for writ of habeas corpus filed pursuant to the provisions of Art. 11.071, V.A.C.C.P.

On September 16, 1994, a jury found applicant guilty of capital murder. The jury returned answers to the punishment phase special issues and the trial court assessed punishment at death. This Court affirmed applicant's conviction on direct appeal. Medellin v. State. No. 71,977 (Tex.Cr.App. delivered March 19, 1997).

In the instant cause, applicant presents five allegations challenging the validity of his conviction and resulting sentence. The trial court has entered findings of facts

and conclusions of law recommending the relief sought be denied.

This Court has reviewed the record. The trial court's findings and conclusions are supported by the record and upon such basis the relief sought by the applicant is denied.

IT IT SO ORDERED THIS 3RD DAY OF OCTOBER, 2001.

Do Not Publish

IN THE 339TH DISTRICT COURT OF
HARRIS COUNTY, TEXAS

Cause No. 675430-A

EX PARTE

JOSE ERNESTO MEDELLIN,
Applicant

RESPONDENT'S PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The Court, having considered the applicant's application for writ of habeas corpus, the Respondent's Original Answer, the evidence elicited at the applicant's capital murder trial in cause no. 675430, affidavits submitted in cause no. 675430-A, and official court documents and records, makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. The applicant, Jose Ernesto Medellin, was indicted and convicted of the felony offense of capital murder in cause no. 675430 in the 339th District Court of Harris County, Texas.

2. The applicant was represented during trial by counsel Jack Millin, now deceased, and Linda Mazzagatti.

3. On September 20, 1994, the trial court assessed the applicant's punishment at death by lethal injection after the jury affirmatively answered the first two special issues and negatively answered the third special issue.

4. The Court of Criminal Appeals affirmed the applicant's conviction in an unpublished opinion delivered March 19, 1997. *Medellin v. State*, No. 71,997 (Tex. Crim. App. Mar. 19, 1997) (not designated for publication).

First Ground—ineffective assistance of appellate counsel re Batson claim: Fourth Ground—Batson claim:

5. The Court finds that, during the State's voir dire examination of prospective juror Elizabeth Ann Berry, she stated that both of her brothers had been arrested for drug-related offenses; that both have had a "number of cases;" that one was "serving time now;" that they had been in and out of the prison system often in the last five or six years; and, that the cases were prosecuted in Harris County (R. XX - 181-2).

6. The Court finds that, on the juror questionnaire, prospective juror Elizabeth Berry described a defense attorney as the underdog, always fighting, and a prosecutor as "on the attack" (R. XX - 184).

7. The Court finds that the State exercised a peremptory strike at the conclusion of the voir dire examination of prospective juror Elizabeth Berry, and the applicant made a *Batson* challenge (R. XX - 226).

8. The Court finds that the trial court requested that the State, "regardless of a prima facie showing," offer an explanation for the strike of prospective juror Elizabeth Berry, and that the State explained that the strike was based upon Berry having two brothers involved in drugs and serving time in prison; that one brother had been in prison on numerous occasions; and, that one brother was presently on parole and the other brother was presently in custody (R. XX - 227-8).

9. The Court finds that the State, in explaining its strike of prospective juror Elizabeth Berry, noted Berry's characterization of the prosecution as on the attack and the defense as the underdog and stated that, as a result, the State would have the perception during the trial that Berry viewed the applicant as the underdog and the prosecutor as a "wild mongrel" on the attack (R. XX - 228).

10. The Court finds that the State, via prosecutor Mark Vinson, stated that he had an appreciation of blacks serving on juries, because he was a black male who grew up during the 1940's, 50's, 60's, 70's, 80's, and 90's (R. XX - 229).

11. The Court finds that the trial court stated that it did not believe that a *prima facie* showing had been made at that time, but the trial court found that the State's reasons for striking prospective juror Elizabeth Berry were race-neutral based on Berry's demeanor and her responses and her juror questionnaire (R. XX - 230).

12. The trial court denied the applicant's *Batson* motion and informed the applicant that the court would reconsider the motion if the applicant wanted to reurge it at the end of jury selection (R. XX - 230).

13. The Court finds that the trial court noted, after denying the applicant's *Batson* challenge, that the jury was then composed of nine people, including a black female, a black male, an Hispanic male, and an Hispanic female; that there was no indication of gender bias; and, that the jury composition at that time was a black female, two white females, an Hispanic female, an Hispanic male, two white males, and a black male (R. XX - 230-1).

14. The Court finds that, during the State's voir dire examination of prospective juror Rafael F. Rodriguez, the State noted that there was hesitation on Rodriguez's part regarding the death penalty when questioned by the trial court and Rodriguez stated that he had not given the death penalty much thought (R. XXI - 71).

15. The Court finds that, during the State's voir dire examination of prospective juror Rafael Rodriguez, his responses concerning his thoughts on the death penalty were unclear and ambiguous (R. XXI - 90, 92-6).

16. The Court finds that, at the conclusion of the voir dire of prospective juror Rafael Rodriguez, the State exercised a peremptory strike on Rodriguez and the applicant made a *Batson* challenge, noting that the applicant and Rodriguez are both Hispanic (R. XXI - 115-6).

17. The Court finds that, at the conclusion of the State's voir dire of prospective juror Rafael Rodriguez and after the applicant's *Batson* challenge, the trial court made a finding of a *prima facie* case, and the State gave the following explanations for the peremptory strike of Rodriguez: that he had a great deal of hesitation when he was talking about the death penalty with the trial court; that the State still did not have a full understanding of Rodriguez's position on the death penalty; and, that

Rodriguez had stated that he was absolutely in favor of the death penalty without any compunctions if the victim were a relative of Rodriguez (R. XXI - 117).

18. The Court finds that the State also noted that prospective juror Rafael Rodriguez's theological and philosophical reply during voir dire examination concerning "turning the other cheek" indicated that Rodriguez would be "looking to turn the other cheek in this case..." (R. XXI - 118).

19. The Court finds that the trial court found that the State's explanation for the peremptory strike of prospective juror Rafael Rodriguez was a racially neutral explanation and the trial court denied the applicant's *Batson* challenge (R. XXI - 118).

20. The Court finds that the applicant, on August 17, 1994, presented a written motion to strike the jury panel based, in part, on the State's exercising thirteen preemptory strikes against the following prospective jurors, as noted by the applicant: (1) Kirven O'Neal Tillis, black male; (2) Mary Freeman, white female; (3) Kathy Felder, black female; (4) Bernard Richardson, black male; (5) Walter Wynn Martin, white male; (6) Andra McCoy, black male; (7) Marie Clark, white female; (8) Vastine Dickie, black male; (9) Christine Rossi, white female; (10) Raford Earl Gresham, white male; (11) Porfirio Rodriguez, Jr., Hispanic male; (12) Elizabeth Ann Berry, black female; and (13) Rafael Rodriguez, Hispanic male (R. I - 264-5) (R. XXVI - 11).

21. The Court finds that, on August 17, 1994, the applicant presented the following argument in support of its motion:

> And the State exercised six of it's (sic) peremptory challenges against black venire members and eight of it's (sic) peremptory challenges against males and the State exercised two of it's (sic) peremptory challenges against Hispanic male venire members. And this also includes a Batson Challenge. And, of course, the Court – I agree that whatever Batson challenges were preserved during the proper objection at the time would be the Batson Challenges that would be considered. But we are bringing to the Court's attention that these persons have been struck and that we would suggest to the Court that it's a prima facie case of discrimination for the State's use of peremptory challenges and we would suggest to the Court that the motion – that our Motion to Strike the Panel be also granted on this premise.

[R. XXVI - 11-2).

22. The Court finds that the State, in response to the applicant's August 17, 1994 argument in support of the applicant's motion to strike the panel, informed the trial court that the record reflected that the final jury was a "melting jury" and that the thirteen noted peremptory strikes were racially neutral (R. XXVI - 12-3).

23. The Court finds that the trial court denied the applicant's motion to strike the jury panel by written order on August 19, 1994 (R. I - 267).

24. The Court finds that the State exercised thirteen peremptory strikes and that a review of the State's peremptory strikes, as noted in the applicant's motion to strike the jury panel, shows that the State struck three white females and two white males, comprising almost fifty percent of the State's thirteen total peremptory strikes (R. I - 264-5) (R. XXVI - 11-2).

25. The Court finds, based on personal recollection, that the prosecutor in the applicant's case was also the prosecutor in the 1993 Harris County capital murder trial of Kenneth Wayne Morris; that the trial judge in the applicant's case and the trial judge in Kenneth Wayne Morris' case was the same person; that the prosecutor offered an explanation for a peremptory strike during jury selection in Kenneth Wayne Morris' case; that the trial judge found the prosecutor's explanation to be racially neutral in Kenneth Wayne Morris' case; and, that the trial judge noted in Kenneth Wayne Morris' case that the same prosecutor had tried a capital case three months earlier and that there were either three or four black jurors. *See Volume 4, page 115, appellate record of The State of Texas v. Kenneth Wayne Morris, cause no. 597997.*

26. The Court finds that the Court of Criminal Appeals, on direct appeal of the capital murder conviction of Kenneth Wayne Morris, overruled Morris' claim that the trial court improperly based her ruling on the absence of purposeful discrimination by the same prosecutor in another criminal trial and stated, "A ruling on a *Batson* objection is a credibility determination. Because the trial judge determines the issue of the prosecutor's credibility, it is not error for the court to consider its past experiences with a prosecutor in determining his credibility." *Morris v. State*, 940 S.W.2d 610, 612 (Tex. Crim. App. 1996).

First Ground - ineffective assistance of appellate counsel re Motion to Preclude State from Seeking Death Penalty:

27. The Court finds that the applicant, prior to trial, filed a written motion too preclude the State from seeking the death penalty and that the clerk's file-mark on the face of the motion notes that the motion was filed at 2:00 p.m. on July 29, 1994 (R. I - 95-107).

28. The Court finds that the face of the applicant's written motion to preclude the State from seeking the death penalty shows the following stamp:

On The Record
Date: 9/9/94
Ct. Reporter: Wong Lee
(R. I - 108).

29. The Court finds that the written order accompanying the applicant's motion to preclude the State from seeking the death penalty is signed by the Honorable Caprice Cosper, the presiding judge of the 339th District Court and that there are initials placed on the line next to "GRANTED" (R. I - 108).

30. The Court finds, based on the appellate record, that the trial court ruled on pre-trial motions and verbally denied the applicant's objection to preclude the State from seeking the death penalty (R. XXVII - 9).

31. The Court finds, based on its personal recollection, that the written order notation on the applicant's motion to preclude the State from seeking the death penalty is an inadvertent error.

32. The Court finds that the applicant's written motion to preclude the State from seeking the death penalty and its accompanying order were a request for the trial court

to preclude the State from seeking the death penalty, not a motion requesting that the State be precluded from carrying out a constitutionally valid death sentence after such sentence is assessed.

33. The Court further finds, based on the applicant's trial in which the State sought the death penalty and on the applicant's resulting death sentence, that the inadvertent error on the written order accompanying the applicant's motion to preclude the State from seeking the death penalty was rendered moot by the applicant's trial and subsequent sentence of death.

Second Ground—ineffective assistance of counsel re contacting probation officer:

34. The Court finds that evidence was presented during the guilt-innocence phase of the applicant's trial showing that the applicant and his co-defendants, Peter Cantu, Efrain Perez, Derrick Sean O'Brien, and Raul Villarreal, took turns sexually assaulting the complainant and Jennifer Ertman (R. XXXII -948-9); that the applicant participated in the strangulation deaths of the complainant and Ertman after the repeated sexual assaults (R. XXXII - 949); that the applicant afterwards laughed and bragged about his part in the sexual assaults and murders (R. XXIX - 389-90); that the applicant said that he "fucked one of the girls in the pussy" and then "fucked her in the ass ;" (R. XXIX - 391-2); that the applicant said that he made one of the girls give him a "blow job" and that he hit her on the top of her head when she would not close her mouth (R. XXIX - 395, 425); and, that the applicant later showed Christina Cantu his underwear with blood on it and stated that he could not believe that one of the girls was telling the truth when she said that she was a virgin; that the applicant, who admitted having sex with both girls, seemed proud that he "opened" the girl who was a virgin, and that he "dirtied" the inside of the girl when he was first entering her; that the applicant said they had fun; and, that the applicant took part of the property stolen from the murdered girls (R. XXIX - 393-4, 397-401, 405, 422, 424-5) (R. XXX - 477-8, 533-4).

35. The Court finds that, during the punishment phase of the applicant's trial, the State presented evidence that the applicant was suspended from school at the age of fourteen in 1990; that he was placed in an alternative school for repeated misbehavior and misconduct; and, that he was not able to function at the alternative school and was expelled from the school district for the remainder of the school year (R. XXXIV - 76-8).

36. The Court finds that, during the punishment phase of the applicant's trial, the State further presented evidence that the applicant called a female teacher a whore, used profanity and defied the rules (R. XXXIV - 7-13).

37. The Court finds that, during the punishment phase of the applicant's trial, the State presented evidence that the applicant made threats of physical violence toward two adult principals when the applicant was a sixteen-year old student in 1992; that he was confrontational, aggressive, and physically resisted the principals when they attempted to calm the applicant; that he screamed profanities at another student; and, that the applicant stated that life did not mean anything to him; he would be on television or in the newspaper for killing someone and jail did not scare him (R. XXXIV - 17-64).

38. The Court finds that, during the punishment phase of the applicant's trial, the State presented evidence that the applicant had been suspended several times from

school by 1992; that he was expelled from school after being in a gang-related fight; and, that the applicant never altered his behavior while attending school before he was permanently removed (R. XXXIV - 64-9).

39. The Court finds that, during the punishment phase of the applicant's trial, the State presented evidence that the applicant was referred as a juvenile on a weapons charge after he was detained as a result of an auto theft and after he was found in possession of a .38 revolver on January 4, 1992 (R. XXIV - 110-54), and that the applicant was charged with the offense of carrying a weapon on July 18, 1992, after a .38 weapon was found partially under the applicant's car seat on the floorboard of the car next to two live rounds of .38 SP ammunition, a more powerful round than a normal .38 round (R. XXXIV - 179-81)

40. The Court finds that, during the punishment phase of the applicant's trial, the State presented evidence that the police talked to the applicant outside of the emergency room at Memorial Northwest Hospital after the applicant and Peter Cantu accompanied the gunshot Efrain Perez to the hospital on June 6, 1993; that the applicant and Cantu were uncooperative, belligerent, abusive, sarcastic and vulgar; and, that the applicant changed his story concerning the shooting several times (R. XXXIV - 197, 216-8).

41. The Court finds that, during the punishment phase of the applicant's trial, the State presented evidence that a shank was found during a search of the applicant's one-man cell in the Harris County Jail on July 1, 1993 (R. XXXIV - 84-90), and that an L-shaped metal pipe, capable of causing serious bodily injury and death, with a sharpened end was also found in the mattress in the applicant's lock-down cell (R. XXXIV - 225-7).

42. The Court finds, based on the appellate record, that information, if any, that the applicant was punctual for appointments with his juvenile probation officer and did not cause his probation officer any problems is inconsequential in light of the overwhelming evidence of the applicant's prior history and in light of the brutality of the offense which the applicant committed.

43. The Court finds, based on the appellate record, that information, if any, that the applicant presented no problems for his probation officer does not establish that the applicant does well when supervised and does not establish that such evidence is indicative of the applicant's expected behavior in prison if he received a life sentence, in light of the extensive evidence showing the applicant's repeated illegal activities and inability to function in structured environments, including jail.

Second Ground—ineffective assistance of counsel re parole eligibility instruction:

44. The Court finds that, during the applicant's trial, trial counsel stated that counsel did not want the trial court to inform the jury of the applicant's parole eligibility in the event of a life sentence because counsel's previous experience in capital cases showed that polled jurors thought that a life sentence was truly a life sentence (R. V. XXVII - 12-3).

45. The Court finds that the issue of parole eligibility was not a matter for the jury's consideration at the time of the applicant's September, 1994 capital murder trial, and the trial court was not required to instruct the jury concerning parole eligibility in a capital case. *Martinez v. State*, 924 S.W.2d 693 (Tex. Crim. App. 1996); *Rhoades v. State*, 934 S.W.2d 113 (Tex. Crim. App.

1996) (citing *Smith v. State*, 898 S.W.2d 838, 846 (Tex. Crim. App. 1995)).

Third Ground—Vienna Convention:

46. The Court finds that the applicant did not object pre-trial or during trial to any violation of the Vienna Convention on Consular Relations which grants a foreign national who has been arrested, imprisoned or taken into custody a right to contact his consulate and requires the arresting government authorities to inform the individual of this right "without delay." Vienna Convention, art. 36(1) (b), 21 U.S.T. at 100-101; 595 U.N.T.S. at 292.

47. The Court finds that testimony during the applicant's trial and the applicant's statement reflect that the applicant was born in Mexico, but lived most of his life in the United States; that he spoke, read and wrote the English language; that he attended Houston public schools beginning with elementary school; that he initially did well in elementary school; that his family and friends lived in the United States; that his father had been gainfully employed since his arrival in the United States; that his mother was presently employed; and that the applicant had been employed in the United States while going to Houston schools (R. XXXV - 279-92) (R. XXX - 652, 670).

48. The Court finds that the applicant's father testified that they had lived in the United States for fifteen years and that both he and the applicant's mother had a "green card" (R. XXXV - 279-80, 288).

49. The Court finds that the applicant's school records contain the notation "516396627" under social security number for the applicant.

50. The Court finds, based on the appellate record, that there was no testimony presented during the applicant's trial that he was not a United States citizen; that the applicant told anyone during his detention that he was a Mexican national; that he requested assistance from the Mexican consulate; or, that he was prevented from requesting assistance from the Mexican consulate.

51. The Court finds that it is a reasonable inference that the applicant was familiar with the laws and procedures of the country and state in which he had lived almost his entire life and that the applicant was familiar with the criminal justice system based on his prior criminal history.

52. The Court finds that the applicant was informed of his *Miranda* rights prior to giving a statement admitting participation in the offense (R. XXX - 633-40) (R. XXXII - 942-5).

53. The Court finds that the Court of Criminal Appeals has held that a defendant does not have standing to advance a claim that his death sentence violated the United Nations Charter, stating that "...treaties operate as contracts among nations. Therefore, it is the offended nation, not an individual, that must seek redress for a violation of sovereign interests." *Hinojosa v. State*, No. 72,932 (Tex. Crim. App. Oct. 27, 1999).

54. The Court finds that the Court of Criminal Appeals has also held that treaties do not constitute "laws" for the purposes of TEX. CODE CRIM. PROC. art. 38.23; specifically, that "the Vienna Convention Treaty illustrates well the proposition that Article 38.23 is not a suitable enforcement mechanism for international treaties." *Rocha v. State*, 16 S.W.3d 1, 19 (Tex. Crim. App. 2000).

55. The Court finds that federal courts have found that a violation of the provisions of the Vienna Convention will not require reversal of a criminal conviction or other judgment, in the absence of a showing that the defendant was actually harmed by the violation. *Faulder v. Johnson*, 81 F.3d 515, 520 (5th Cir. 1996), *cert. denied*, __ U.S. __, 117 S. Ct. 487 (1997); *United States v. $69,530.00 in United States Currency*, 22 F.Supp.2d 593, 595 (W.D.Tex. 1998).

Fifth Ground—Brady issue:

56. The Court finds that, during the guilt-innocence phase of the applicant's trial, the State presented testimony from Joe Cantu, the brother of the applicant's co-defendant Peter Cantu, and from Christina Cantu, Joe Cantu's wife, about the admissions the applicant made concerning his part in the capital murder (R. XXIX - 366-373, 383-425) (R. XXX - 490-540).

57. The Court finds, according to the credible affidavit of Gail Hays, Harris County District Attorney's Office Investigator, that Hays was assigned as an investigator to the 263rd District Court during 1994; that Assistant District Attorney Marie Munier was the chief of the 263rd District Court and was the prosecutor in the trial of the applicant's co-defendant Efrain Perez at that time; that Hays talked with witnesses Christina and Joe Cantu; that Hays made no deals or agreements with Christina and Joe Cantu in exchange for their cooperation or testimony as witnesses; that Hays did not promise the Cantus any reward money in exchange for their cooperation or testimony; and, that Hays did not promise "protection" to either Christina or Joe Cantu.

58. The Court further finds, according to the credible affidavit of Gail Hays, that Hays was aware that Christina Cantu was pregnant, but Hays was not aware of any miscarriage and was never informed of any alleged beating of Christina Cantu; that Hays became aware that Joe Cantu had been arrested prior to trial when Christina Cantu telephoned Hays and gave her such information; that Hays' understanding was that Joe Cantu made a statement about "blowing up" his place of employment after having an argument at work and Joe Cantu was subsequently arrested; that Hays informed Assistant District Attorney Marie Munier of Joe Cantu's arrest either the night Hays learned he had been arrested or the next business day; that Hays had no knowledge of any events concerning Joe Cantu's arrest after that time; that Hays did not recommend a lawyer or give any lawyer's name to either Joe or Christina Cantu; that Hays made no promises concerning Joe Cantu's case; and, that Hays was not aware of the disposition of Joe Cantu's arrest until December, 1999.

59. The Court finds, according to the credible affidavit of Harris County Assistant District Attorney Marie Munier, the prosecutor in the case of the applicant's co-defendant Efrain Perez, that Munier learned that Joe Cantu had been arrested prior to trial; that Munier has no specific recollection of informing Assistant District Attorneys Mark Vinson or Terry Wilson of Joe Cantu's arrest; that Munier made no deals or agreements with Joe or Christina Cantu involving their testimony in the trials or involving Joe Cantu's arrest; that Munier took no action involving Joe Cantu's arrest or the disposition of his case; that Munier was aware that Joe Cantu's case was dismissed prior to the trials of the applicant and co-defendant Efrain Perez; that Munier made no promises or assurances to either Joe or Christina Cantu concern-

ing any reward money in exchange for their cooperation or testimony; Munier was aware that Christina Cantu was pregnant, but Munier was not aware of any miscarriage; and, that Munier was never told of any alleged beating of Christina Cantu.

60. The Court finds, according to the credible affidavit of Harris County Assistant District Attorney Mark Vinson, the prosecutor in the applicant's capital murder trial, that, Vinson did not make any deals or agreements with Joe or Christina Cantu involving their testimony in the trials; that Vinson did not promise or assure either Joe or Christina Cantu that they would receive any reward money in exchange for their cooperation and testimony; that Vinson has no specific recollection of being aware of either Joe Cantu's 1994 arrest for a misdemeanor offense or the disposition of Joe Cantu's case; that Vinson had nothing to do with the disposition of Joe Cantu's case; that Vinson has a slight recollection of being aware that Christina Cantu was pregnant, but he was never aware of any miscarriage; and, that Vinson was never told of any alleged beating of Christina Cantu.

61. The Court finds, based on official court records, that a complaint against Joe Cantu for the misdemeanor offense of terroristic threat, cause no. 9425339, Harris County Court at Law # 13, was dismissed on August 4, 1994, based on insufficient evidence; that trial testimony began in the applicant's case on September 12, 1994 (R. XXVIII - 34); and, that Joe Cantu testified in the applicant's case on September 14, 1994 (R. XXX - 490-577). *See attached complaint and motion to dismiss, cause no. 9425339.*

62. The Court finds, based on the credible affidavit of Harris County Assistant District Attorney Joni Vollman, that Vollman was the chief prosecutor in Harris County Court at Law #13 in August, 1994; that Vollman signed the motion to dismiss contained in the clerk's file in the State of Texas v. Joe Cantu, cause no. 9425339, in which Cantu was charged with the misdemeanor offense of terroristic threat; that Vollman has no specific recollection as to the facts of the case in cause no. 9425339; that Vollman had some awareness that Joe Cantu was related to the defendant Peter Cantu, one of the defendant's in Elizabeth Pena and Jennifer Ertman's murders; that Vollman's vague awareness about this relationship did not influence Vollman's dismissal of the charges against Joe Cantu in cause no. 9425339; that Vollman would have specifically remembered if anyone in the Harris County District Attorney's Office had approached her, requesting, suggesting, or ordering that charges be dismissed against Joe Cantu; that Vollman states with certainty that she has no such recollection; and, that the charges against Joe Cantu in cause no. 9425339 were dismissed based on insufficient evidence. *See attached March 1, 2000 affidavit of Joni Vollman.*

CONCLUSIONS OF LAW

First Ground—ineffective assistance of appellate counsel re Batson claim: Fourth Ground—Batson issue:

1. The trial court properly found that the State's explanations that the State exercised a peremptory strike against prospective juror Elizabeth Berry based on her two brother's criminal history, including one of the brother's being on parole and the other brother being incarcerated, and based on Berry's perception of the applicant being the underdog and the prosecutor being the attacker were racially neutral explanations logically

related to the instant case. *See Harris v. State*, 827 S.W.2d 945, 955 (Tex. Crim. App. 1992) (holding that prosecutor's explanation in capital case that he struck venireperson because her brother was on probation for burglary was racially neutral).

2. The trial court properly found that the State's explanation that the State struck prospective juror Rafael Rodriguez, in part, because the State still did not have a full understanding of Rodriguez's position on the death penalty is supported by the ambiguity of Rodriguez's cited voir dire statements about the death penalty, and the State's explanation that the State feared that Rodriguez believed in "turning the other cheek" was a racially neutral explanation which does not violate the precepts of *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712 (1986); *see Cantu v. State*, 842 S.W.2d 667, 688-9 (Tex. Crim. App. 1992) (holding that trial court's finding that prosecutor's reasons for striking prospective juror were racially neutral where prosecutor stated that strike was based, in part, on prospective juror's volunteer work indicating that she would be "kind-hearted"); *see also Lewis v. State*, 911 S.W.2d 1, 4 (Tex. Crim. App. 1995) (holding that prosecutor could exercise peremptory strikes against two prospective jurors who were not in favor of death penalty as long as strikes not made in racially discriminatory manner).

3. The applicant, in his written motion to strike the jury panel, fails to establish a *prima facie* case of purposeful discrimination in the State's peremptory strikes. *Harris*, 827 S.W.2d at 955 (holding that defendant, in order to establish *prima facie* case, may rely on fact that peremptories constitute jury selection practice that allows those to discriminate who are of mind to discriminate, and defendant must show this fact and other

relevant circumstances raise inference that peremptories were exercised to exclude prospective jurors on basis of race).

4. In the alternative, the trial court properly found that the State's explanations for striking specific jurors were racially neutral. *Wheatfall v. State*, 882 S.W.2d 829, 835 (Tex. Crim. App. 1994) (holding State has burden to present neutral explanation for strike); *see also Trevino v. State*, 864 S.W.2d 499, 500 (Tex. Crim. App. 1993) (holding State's explanation for strike does not have to rise to level needed to justify challenge for cause).

5. The applicant fails to show that the trial court's decision that the State's strikes were racially neutral was clearly erroneous. *Id.* (holding appellate court may not reverse trial court's decision that State's strike is racially neutral unless trial court's decision is clearly erroneous and trial court's choice of interpretation may not be found to be clearly erroneous when evidence is susceptible to two reasonable interpretations and trial court's decision is in accord with one of these two interpretations).

6. The applicant fails to show that the trial court erred in allegedly failing to grant a *Batson* hearing, and the applicant fails to show that his rights under the equal protection clause, U.S. CONST. amend. XIV, were violated.

7. The applicant fails to show that appellate counsel is ineffective for not presenting on direct appeal the claim that the trial court allegedly erred in finding that the State gave race neutral reasons for peremptory strikes and in allegedly not granting a *Batson* hearing. The applicant fails to show that, but for appellate counsel's alleged error, the results of the proceeding would have

been different. *Ex parte Butler*, 884 S.W.2d 782, 783 (Tex. Crim. App. 1994) (holding that *Strickland* standard applies to appellate counsel as well as trial counsel).

First Ground—ineffective assistance of appellate counsel re Motion to Preclude State from Seeking Death Penalty:

8. The applicant fails to show that appellate counsel is ineffective for not advancing the meritless claim that the trial court allegedly erred in orally denying the applicant's Motion to Preclude State from Seeking the Death Penalty when the trial court allegedly granted the same written motion. *See Butler*, 884 S.W.2d at 783; *see also Kinnamon v. State*, 791 S.W.2d 84, 97 (Tex. Crim. App. 1990) (counsel not ineffective for failing to request jury charge on lesser-included of murder when the evidence did not support such charge).

Second Ground—ineffective assistance of counsel re contacting probation officer:

9. The applicant fails to show deficient performance, much less harm, in trial counsel's not contacting probation officer Guerra and not presenting punishment evidence that the applicant was allegedly punctual for appointments with his probation officer and that the applicant allegedly presented no problems for his probation officer, in light of the overwhelming evidence of the brutality of the applicant's crime, the applicant's past illegal activities, and the applicant's inability to function in the structured environments of school and jail. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984).

Second Ground—ineffective assistance of counsel re parole eligibility instruction:

10. The trial court properly did not instruct the jury as to parole eligibility and defense counsel properly did not voir dire on the issue of parole eligibility. *See Martinez v. State*, 924 S.W.2d 693 (Tex. Crim. App. 1996) (holding issue of parole eligibility not a matter for jury's consideration in capital murder trial); *Rhoades v. State*, 934 S.W.2d 113 (Tex. Crim. App. 1996) (citing *Smith v. State*, 898 S.W.2d 838, 846 (Tex. Crim. App. 1995)).

11. Trial counsel are not ineffective for making the reasonable, strategic decision, based on prior experience, not to request that the jury be informed and instructed concerning parole eligibility, an instruction which would make the jury aware that the eighteen-year old applicant would be eligible for parole at the relatively young age of forty-three. *Ex parte Ewing*, 570 S.W.2d 941 (Tex. Crim. App. 1978) (appellate court will review trial strategy only when it is without a plausible basis).

12. The applicant fails to show deficient performance, much less harm, based on trial counsels' reasonable trial strategy of not informing the jury concerning parole eligibility; thus, the applicant fails to show that his rights, pursuant to U.S. CONST. Amends. VI and XIV, were violated.

Third Ground—Vienna Convention:

13. Based on the applicant's lack of objection at trial to the alleged failure to inform him of his rights under the Vienna Convention, the applicant is procedurally barred from presenting his habeas claim that the alleged violation of the Vienna Convention violated his constitutional rights. *Hodge v. State*, 631 S.W.2d 754, 757

(Tex. Crim. App. 1982); *Williams v. State*, 549 S.W.2d 183, 187 (Tex. Crim. App. 1977).

14. In the alternative, the applicant fails to show foreign nationality which requires notification of a foreign consulate when a "national" of the "sending state" is detained in custody. *See Maldonado v. State*, 998 S.W.2d 239, 246-7 (Tex. Crim. App. 1999) (holding that defendant not entitled to art. 38.23 instruction where defendant not informed of his right to consult consulate but evidence showed that defendant lived in United States many years, spoke English, had Texas driver's license, and bought car in United States and evidence did not show that defendant was a Mexican citizen).

15. In the alternative, the applicant, as a private individual, lacks standing to enforce the provisions of the Vienna Convention. *Hinojosa v. State*, No. 72,932 (Tex. Crim. App. Oct. 27, 1999) (holding that treaties operate as contracts among nations; thus, offended nation, not individual, must seek redress for violation of sovereign interests).

16. In the alternative, the applicant fails to show that he was harmed by any lack of notification to the Mexican consulate concerning his arrest for capital murder; the applicant was provided with effective legal representation upon the applicant's request; and, the applicant's constitutional rights were safeguarded. *See and cf. Rocha v. State*, 16 S.W.3d 1, 19 (Tex. Crim. App. 2000) (holding that treaties do not constitute "laws" for purpose of TEX. CODE CRIM. PROC. art. 38.23, and Vienna Convention Treaty illustrates proposition that art. 38.23 is not suitable enforcement mechanism for international treaties).

17. The applicant fails to show that his rights, pursuant to U.S. CONST. amends. V, VI, and XIV, were violated and fails to show that any non-notification of the Mexican authorities impacted on the validity of his conviction or punishment. *Ex parte Barber*, 879 S.W.2d 889, 891-92 (Tex. Crim. App. 1994) (holding that, in order to be entitled to habeas relief, defendant must plead and prove that complained-of error did, in fact, contribute to his conviction or punishment).

Fifth Ground—Brady issue:

18. The applicant fails to show that there was any deal between the State and Joe and Christina Cantu; thus, the applicant fails to show that the State did not disclose material evidence, i.e., a non-existent agreement between Joe and Christina Cantu in exchange for their testimony during the applicant's trial. The applicant fails to show that the State did not disclose a non-existent agreement or any alleged favorable and material information in the instant case. *United States v. Agurs*, 427 U.S. 97, 96 S. Ct. 2392 (1976); *United States v. Bagley*, 473 U.S. 667, 105 S.Ct. 3375 (1985) (holding evidence is material where there is a reasonable probability that, if disclosed, result of the proceeding would have been different). The applicant fails to show that he was denied due process under U.S. CONST. amend. XIV and TEX. CONST. art. 1, § 10.

19. The applicant fails to demonstrate that his conviction was unlawfully obtained. Accordingly, it is recommended to the Texas Court of Criminal Appeals that relief be denied.

BY THE FOLLOWING SIGNATURE, THE COURT ADOPTS THE RESPONDENT'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW IN CAUSE NO. 675430-A.

Signed this 22nd day of January, 2001.

CAPRICE COSPER
CAPRICE COSPER
Presiding Judge
339th District Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action No. H-01-4078

JOSE ERNESTO MEDELLIN,
Petitioner,

—v.—

JANIE COCKRELL, Director, Texas Department of Criminal Justice, Institutional Division,
Respondent.

ORDER

Petitioner Jose Ernesto Medellin ("Medellin") filed a federal petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 challenging his capital conviction and death sentence. (Docket Entry # 12). Pending before the Court is Respondent Janie Cockrell's ("Respondent") motion for summary judgment. (Docket Entry # 16). Having considered the record, the pleadings, and the applicable law, particularly the application of the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), the Court **grants** respondent's motion for summary judgment, **denies** Medellin's petition, and **denies** a Certificate of Appealability.

BACKGROUND

On September 23, 1993, a Texas grand jury indicted Medellin for his role in the capital murder of Elizabeth Pena. The evidence in the guilt/innocence phase of trial showed that on June 24, 1993, Medellin and his fellow gang members raped and killed sixteen-year-old Elizabeth Pena and her fourteen-year-old friend, Jennifer Ertman. The evidence at trial, briefly summarized, showed that, after participating in a gang initiation, Medellin and other gang members encountered the victims walking along railroad tracks at approximately 11:30 p.m. Over the next hour, the gang repeatedly and viciously raped the two girls. The testimony at trial established that Medellin participated in the rape of both victims. The gang members then strangled the two girls to death. Trial testimony established that Medellin helped strangle Elizabeth Pena with one of his shoestrings. In describing the attacks later, Medellin appeared "hyper, giggling and laughing" as he recounted his role. Medellin also bragged about deflowering one of the young girls. The only remorse Medellin showed was that he did not have a gun so that the killing would have been quicker.[1]

The jury found Medellin guilty of capital murder.[2] In a separate punishment phase, the State presented evidence of Medellin's violent character and criminal offenses. Medellin had a long history of violent threats and misbehavior, often associated with the possession of firearms. The State also presented evidence that Medellin had been discovered with a "shank" in his cell while incarcerated pending trial. The defense's punishment phase case focused on testimony that Medellin had a good character and on an expert's opinion that he would not be a future danger to society. The jury answered Texas' special issues in a manner requiring the imposition of a death sentence.

The Court of Criminal Appeals denied Medellin's direct appeal from his conviction and sentence on March 19, 1997. *Medellin v. State*, No. 71, 997 (Tex. Crim. App. Mar. 19, 1997) (unpublished). Medellin did not seek *certiorari* review in the United States Supreme Court.

Medellin filed a state application for habeas corpus relief. The trial habeas court held that no controverted, previously unresolved issues existed and found it unnecessary to hold an evidentiary hearing. State Habeas Record at 177.[3] On January 22, 2001, the trial court signed the State's proposed findings and conclusions recommending that habeas relief be denied. State Habeas Record at 198-218. The Court of Criminal Appeals found that the record supported the lower court's findings and conclusions and, on that basis, denied relief. *Ex parte Medellin*, No. 50, 191-01 (Tex. Crim. App. Oct. 3, 2001).

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[1] Medellin confessed to his participation in the rape and murder of the two girls. Medellin's confession portrays a more limited involvement in the crimes than he bragged about immediately after the killings. Medellin's confession, however, indicates that he participated in the rape of Elizabeth Pena and then helped another gang member strangle her.

[2] The State indicted Medellin under three different theories: capital murder of Elizabeth Pena in the course of a kidnaping; capital murder of Elizabeth Pena in the course of a robbery; and capital murder of Elizabeth Pena in the course of aggravated sexual assault. Tr. Vol. I at 6. The jury instructions provided for his conviction under any of those theories. Tr. Vol. I at 285-86. The jury returned a general verdict of guilty without specifying under which theory it convicted Medellin. Tr. Vol. I at 294.

[3] Judge Caprice Cosper presided over Medellin's trial and his state habeas proceedings.

On November 28, 2001, Medellin filed a preliminary federal petition for a writ of habeas corpus through appointed counsel. (Docket Entry # 5). On July 18, 2002, Medellin amended his habeas petition. (Docket Entry # 12). Medellin's amended petition raises five grounds for habeas relief:

1. Medellin's Sixth Amendment right to effective assistance of counsel was violated by trial counsel's[4] failure to present evidence of his good behavior while on juvenile probation, trial counsel's failure to present evidence of the parole eligibility accompanying a life sentence, and appellate counsel's[5] failure to seek enforcement of a trial court order allegedly precluding the State from seeking a death sentence;
2. The State violated Medellin's rights under the Vienna Convention by not protecting his right to consular access;
3. The State violated the Fourteenth Amendment by exercising its peremptory challenges in a discriminatory manne;
4. The State failed to disclose material exculpatory information to the defense; and
5. The trial court denied Medellin an impartial jury by excluding a potential juror for her opposition to capital punishment.

Respondent seeks summary judgment on the merits of Medellin's claims. (Docket Entry # 16). Medellin has

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[4] Jack Millin and Linda Mazzagatti represented Medellin at trial. For the sake of clarity, the Court will generally refer to these attorneys conjunctively as "trial counsel."

[5] Randy McDonald represented Medellin on appeal. This Court will refer to him as "appellate counsel."

filed a response to the summary judgment motion. (Docket Entry # 24).

STANDARDS OF REVIEW

Respondent seeks summary judgment in this case. In ordinary civil cases, summary judgment is appropriate if "there is no genuine issue as to any material fact" and "the moving party is entitled to judgment as a matter of law." FED. R. Civ. P. 56(c); *Rojas v. TK Communications, Inc.*, 87 F.3d 745, 747 (5th Cir. 1996). A petition for writ of habeas corpus is a civil action in federal court. *See Archer v. Lynaugh*, 821 F.2d 1094, 1096 (5th Cir. 1987). "As a general principle, Rule 56 of the Federal Rules of Civil Procedure, relating to summary judgment, applies with equal force in the context of habeas corpus cases." *Clark v. Johnson*, 202 F.3d 760, 764 (5th Cir.), *cert. denied*, 531 U.S. 831 (2000). However, "[t]he Federal Rules of Civil Procedure apply in the context of habeas suits to the extent that they are not inconsistent with the Habeas Corpus Rules." *Woodford v. Garceau*, __ U.S. __, 123 S. Ct. 1398, 1402 (2003); *see also* Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts. In habeas proceedings, a court's summary judgment review is circumscribed by the AEDPA. *See Proctor v. Cockrell*, 283 F.3d 726, 729-30 (5th Cir. 2002).

The intent of the AEDPA is "to prevent federal habeas 'retrials' and to ensure that state-court convictions are given effect to the extent possible under law." *Bell v. Cone*, 535 U. S. 685, 693 (2002); *see also Woodford* __ U.S. at __, 123 S. Ct. at 1401 ("Congress enacted AEDPA to reduce delays in the execution of state and federal criminal sentences, particularly in capital cases."). The AEDPA "embodies the principles of federalism, comity, and finality of judgments," *Evans v. Cockrell*, 285 F.3d 370, 374 (5th Cir. 2002), "substantially restrict[ing] the scope of federal review of state criminal court proceedings." *Montoya v. Johnson*, 226 F.3d 399,404 (5th Cir. 2000), *cert. denied*, 532 U.S. 1067 (2001); *see also Woodford v. Visciotti*, __ U. S. __ , 123 S. Ct. 357, 360 (2002) ("[Section] 2254(d)'s highly deferential standard for evaluating state-court rulings . . . demands that state court decisions be given the benefit of the doubt."). In essence, the "AEDPA was enacted, at least in part, to ensure comity, finality, and deference to state court habeas determinations by limiting the scope of collateral review and raising the standard for federal habeas relief." *Robertson v. Cockrell*, 324 F.3d 297, 306 (5th Cir. 2003).

The AEDPA provides that a federal habeas petition shall not be granted with respect to any claim adjudicated on the merits in state court unless the adjudication:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254 (d)(l)-(2). Deference under the AEDPA differs depending on whether the state court engaged in a legal, factual, or mixed inquiry. *See Gachot v. Stalder*, 298 F.3d 414,417-18 (5th Cir. 2002).

Federal courts analyze questions of law and mixed questions of law and fact under 28 U.S.C. § 2254(d)(1) to determine whether the state court decision was either "contrary to" or an "unreasonable application" of

Supreme Court precedent. *See DiLosa v. Cain*, 279 F.3d 259, 262 (5th Cir. 2002); *Martin v. Cain*, 246 F.3d 471, 475 (5th Cir.), *cert. denied*, 534 U.S. 885 (2001). The Supreme Court holds that a state court decision is "contrary to" federal precedent if: (1) the state court's conclusion is "opposite to that reached by [the Supreme Court] on a question of law" or (2) "the state court decides a case differently than [the Supreme Court] has on a set of materially indistinguishable facts." *Williams v. Taylor*, 529 U.S. 362, 413 (2000); *see also Bell*, 535 U.S. at 698; *Early v. Packer*, __ U.S, __, 123 S. Ct. 362, 365 (2002). A state court may unreasonably apply federal law if it "identifies the correct governing legal rule from [the Supreme Court] cases but unreasonably applies it to the particular facts of the particular state prisoner's case" or "if the state court either unreasonably extends a legal principle from [Supreme Court] precedent to anew context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." *Williams*, 529 U.S. at 407.[6]

A federal habeas court's review under 28 U.S.C. § 2254(d) "should be on the ultimate legal conclusion that the state court reached and not on whether the state court considered and discussed every angle of the evidence." *Neal v. Puckett*, 286 F.3d 230, 246 (5th Cir. 2002), *cert. denied*, __ U.S. __, 123 S. Ct. 963 (2003). In reviewing the state court's substantive decision under the AEDPA, this court focuses on " 'determining the reasonableness of the state court's 'decision,' . . . not grading their papers.' " *Santellan v. Cockrell*, 271 F.3d 190, 193 (5th Cir. 2001) (quoting *Cruz v. Miller*, 255 F.3d 77, 86 (2d Cir. 2001)), *cert. denied*, 535 U.S. 982 (2002); *cf. Dillard v. Blackburn*, 780 F.2d 509, 513 (5th Cir. 1986) (observing that "federal courts do not sit as courts of appeal and error for state court convictions"). Thus, this Court bases its analysis on "the state court's ultimate conclusion, not on its reasoning process." *DiLosa*, 279 F.3d at 262; *Neal*, 286 F.3d at 246.

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[6] An unreasonable application of federal law "is different from an *incorrect* application of federal law." *Id.* at 410. To provide relief, a federal habeas court must not only conclude that "the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Id.* at 411; *see also Woodford*, __ U.S. at __, 123 S. Ct. at 361 (differentiating between an incorrect state determination and an "unreasonable application of federal law"); *Valdez v. Cockrell*, 274 F.3d 941, 947 (5th Cir. 2001) ("Thus, a state court application maybe incorrect in our independent judgment and, yet, reasonable."), *cert. denied*, __ U.S. __, 123 S. Ct. 106 (2002).

The AEDPA affords deference to a state court's resolution of factual issues. Under 28 U.S.C. § 2254(d)(2) "a decision adjudicated on the merits in a state court and based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding[.]" *Miller-El v. Cockrell*, __ U.S. __, 123 S. Ct. 1029, 1043 (2003). A federal habeas court must presume the underlying factual determinations of the state court to be correct, unless the petitioner "rebut[s] the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1); *see also Miller-El*, __ U.S. at __, 123 S. Ct. At 1036.[7]

Notwithstanding a petitioner's ability to show that a state court decision is erroneous under 28 U.S.C. § 2254(d), that does not guarantee that a petitioner is entitled to habeas relief. The language of 28 U.S.C. § 2254(d) "does not *require* federal habeas courts to grant relief reflexively." *Robertson*, 324 F. 3d at 306; *see also Aleman v. Sternes*, 320 F.3d 687, 690-91 (7th Cir. 2003) (finding that 28 U.S.C. § 2254(d) does not entitle a petitioner to habeas relief). No Supreme Court case "hat[s] suggested that a writ of habeas corpus should automatically issue if a petitioner satisfies the AEDPA standard[.]" *Horn v. Banks*, 536 U.S. 266, 272 (5th Cir. 2002). A habeas corpus petitioner meeting his burden under 28 U.S.C. § 2254(d) must still comply with 28 U.S.C. § 2254(a): he must show that "he is in custody in violation of the Constitution or law and treaties of the United States." This includes a showing that any constitutional error at trial "had a 'substantial and injurious effect or influence in determining the jury's verdict.'" *Robertson*, 324 F.3d at 304 (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993)); *see also Aleman*, 320 F.3d at 690 ("Nothing in the AEDPA suggests that it is appropriate to issue writs of habeas corpus even though any error of federal law that may have occurred did not affect the outcome"). Habeas relief is also unavailable if it would require the creation of a new constitutional rule. *See Horn*, __ U.S. at __, 122 S. Ct. at 2151 (relying on *Teague v. Lane*, 489 U.S. 288 (1989)).

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[7] The AEDPA also established strict standards limiting the availability of evidentiary hearings in federal court. *See* 28 U.S.C. § 2254(e)(2). Medellin requests a hearing but has not shown that such a hearing is necessary to the adjudication of his claims. As the availability of an evidentiary hearing is within the discretion of this Court, *see Williams v. Taylor*, 529 U.S. 420, 436 (2000) (stating that it was "Congress' intent to avoid unneeded evidentiary hearings in federal habeas corpus"); Rule 8 of the Rules Governing Section 2254 Cases ("If it appears that an evidentiary hearing is not required, the judge shall make such disposition of the petition as justice shall require."), this Court holds that there is no need for an evidentiary hearing in this case.

ANALYSIS OF THE CASE

I. Effective Assistance of Counsel

Medellin raises three claims criticizing his trial and appellate legal representation. Medellin first argues that trial counsel's representation in the punishment phase fell below constitutional norms when counsel failed to present evidence of his good probation history. Also, Medellin faults trial counsel for not alerting the jury to the fact that he would not be eligible for parole for at least thirty-five years if given a life sentence. Medellin finally faults appellate counsel for not seeking enforcement of an apparently erroneous order precluding the State from seeking the death penalty. The Texas courts rejected each of those claims. This Court will consider their merits under the relevant legal standards.

A. Strickland standard

The proper standard for evaluating the effectiveness of counsel is reasonable performance under prevailing professional norms. *See Strickland v. Washington*, 466 U.S. 668, 688 (1984). In *Strickland*, the Supreme Court established a two-prong test for resolving ineffective assistance claims. Under that test, a defendant must show that counsel's performance was deficient and prejudicial to the defense. *Id.* at 687. "Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim." *Id.* at 700. Both the performance and prejudice components of the ineffective assistance of counsel inquiry are mixed questions of law and fact. *See Motley v. Collins*, 18 F.3d 1223, 1226 (5th Cir.), *cert. denied*, 513 U.S. 960 (1994).

To establish deficient performance, the petitioner must show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed . . . by the Sixth Amendment." *Strickland*, 466 U.S. at 687. In reviewing ineffectiveness claims "judicial scrutiny of counsel's performance must be highly deferential," and every effort must be made to eliminate "the distorting effect of hindsight." *Id.* at 689.

A petitioner must also show that counsel's deficient performance resulted in a reasonable probability of a different result. A reasonable probability is one that is sufficient to undermine confidence in the outcome. *See id.* However, "an analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective." *Lockhart v. Fretwell*, 506 U.S. 364, 369 (1993). Thus, in addition to establishing a reasonable probability of a different result, a petitioner must demonstrate that counsel's deficient performance rendered the result of the proceeding fundamentally unfair or unreliable. *See Vuong v. Scott*, 62 F.3d 673, 685 (5th Cir.) (citing *Lockhart*, 506 U.S. at 372), *cert. denied*, 516 U.S. 1005 (1995).

The burden of proof in a habeas corpus proceeding attacking the effectiveness of trial counsel is on the petitioner. *See Montoya*, 226 F.3d at 408; *Jernigan v. Collins*, 980 F.2d 292, 296 (5th Cir. 1992), *cert. denied*, 508 U.S. 978 (1993). A petitioner's conclusory and speculative allegations will not suffice in this regard. *See Kinnamon v. Scott*, 40 F.3d 731, 734-35 (5th Cir.), *cert. denied*, 513 U.S. 1054 (1994); *Barnard v. Collins*, 958 F.2d 634, 643 n.11(5th Cit. 1992), *cert. denied*, 506 U.S. 1057 (1993). The Fifth Circuit has cautioned that

> [a] claim of ineffective assistance of counsel must be judged with eyes directly upon the reality of the situation facing defense counsel at the time of the acts and not years later. This discipline best assures faithful application of the objective measure of

> whether the decisions of defense counsel are within the range of those a reasonably competent lawyer might have made under those same facts and circumstances. It also takes us far along in judging its prejudice, if that inquiry is required.

Black v. Cockrell, 314 F.3d 752, 754-55 (5th Cir. 2002), *cert. denied*, __ U.S.__, __ S. Ct. __, 2003 WL 1235155 (April 21, 2003).[8] The Court will apply the above-stated standards to Medellin's ineffective-assistance-of-counsel claims.

B. *Failure to present evidence of good behavior while on juvenile probation*

During the punishment phase, trial counsel called several witnesses to present testimony that would support a

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[8] The Fifth Circuit's language echos the *Strickland* decision:

> A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. . . . There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.
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> * * * *
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> Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. . . . The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. . . . [T]he court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.

Strickland, 466 U.S. at 689-90; *see also Williams v. Collins*, 16 F.3d 626,631 (5th Cir.), *cert. denied*, 512 U.S. 1289 (1994).

life sentence. These witnesses included former employers, friends, and family members. Medellin also called a psychologist whose testimony suggested that Medellin would not be a future danger to society. Medellin now argues that trial counsel provided ineffective assistance by not calling his former juvenile probation officer as a witness. Medellin contends that trial counsel should have presented his probation officer's testimony to show that he would not be a danger when placed under supervision, thus encouraging the jury to answer the special issues in a manner favoring a life sentence.

Medellin fails to support this claim with competent evidence. Claims of uncalled witnesses are not favored on habeas review because they are "largely speculative." *Evans*, 285 F.3d at 377. A petitioner raising such claims generally leaves a court to speculate on the exact nature of an uncalled witness' putative testimony. Here, Medellin has failed to provide this Court with any reliable indication of what testimony Medellin's former probation officer would have given if called as a witness. Medellin relies on an affidavit from his state habeas investigator stating that his probation officer, Maria Guerra, told her that Medellin "came on time" and that she "never had a problem" with him. (Docket Entry # 12, Exhibit F). Essentially, Ms. Guerra allegedly told the investigator that Medellin "did what he was supposed to do." (Docket Entry # 12, Exhibit F). What Medellin's former probation officer allegedly told his habeas investigator is hearsay, and Medellin has not shown that it falls under any exception to the hearsay rule. *Cf.* FED R. EVID. 802; *see also Herrera v. Collins*, 506 U.S. 390, 417-18 (1993) (holding on the facts of the case that affidavits containing hearsay statements obtained eight years after the habeas petitioner's trial were not sufficient to grant habeas relief). Absent the hearsay statements in his investigator's affidavit, this Court is left with nothing but speculation concerning what a former probation officer may have added to Medellin's defense. This claim could be rejected on that basis alone.

Even assuming that the hearsay statements are reliable, Medellin fails to show an entitlement to habeas relief. The state habeas court issued several factual findings commenting on the potential impact of the putative evidence:

> 42. The Court finds, based on the appellate record, that information, if any, that the applicant was punctual for appointments with his juvenile probation officer and did not cause his probation officer any problems is inconsequential in light of the overwhelming evidence of the applicant's prior history and in light of the brutality of the offense which the applicant committed.
>
> 43. The Court finds, based on the appellate record, that information, if any, that the applicant presented no problems for his probation officer does not establish that the applicant does well when supervised and does not establish that such evidence is indicative of the applicant's behavior in prison if he received a life sentence, in light of the extensive evidence showing the applicant's repeated illegal activities and inability to function in structured environments, including jail.

State Habeas Record at 207, ¶¶ 42, 43. The state habeas court concluded that the absence of the probation evidence did not meet either prong of the *Strickland* analysis. State Habeas Record at 215, ¶ 9. That decision was neither contrary to, nor an unreasonable application of, federal law.

Trial evidence portrayed Medellin as an extremely violent and depraved individual. The State presented extensive evidence that Medellin consistently broke the law, often in a violent manner. Medellin participated in the brutal gang rape and murder of two young girls. As noted by the Court of Criminal Appeals on direct review, "[t]he facts of the case are brutal and barbaric enough to alone support the jury's answer to the [future dangerous] special issue." Opinion on Direct Review ("Opinion") at 7. The mere fact that Medellin was prompt at his probation appointments and never caused his probation officer problems would not overcome the substantial, nearly overwhelming, evidence of his future dangerousness.

The punishment phase evidence rebuts Medellin's insistence that the probation officer's testimony could have shown that he would not be a threat in a structured environment. The State presented evidence that, while incarcerated pending trial, Medellin secreted weapons in his cell. Medellin's own actions refute any inference that he would not be violent in prison. In light of the depraved nature of the offense, his highly violent character, and his poor behavior while incarcerated, the fact that Medellin was not tardy at his probation meetings does not create a reasonable probability that the jury would not find him to be a future danger. The state court's decision was not contrary to, or an unreasonable application of, federal law. *See* 28 U.S.C. § 2254(d)(1). This claim is denied.

C. *Failure to emphasize the parole eligibility accompanying a life sentence*

Medellin also faults counsel for not making the jury aware, either through voir dire questioning or through a jury instruction, that Texas law provided for parole only after thirty-five years incarceration if the jury returned a life sentence. The trial court indicated to the defense that it would be willing to allow parole eligibility information to come before the jury. Tr. Vol. 27 at 12. Trial counsel Ms. Mazzagatti told that court that her co-counsel Mr. Millin

> has already articulated to the Court his reasons for not wanting to pursue the basis of informing the jurors of the 35 years because he had previously, based on his experience in six other capital murder trials, polled jurors and found that they believe that it was truly a life sentence. And so he thought as a strategy he would not proceed with the advising people on the 35 years.

Tr. Vol. 27 at 12-13. Medellin now argues that trial counsel's failure to present evidence of parole eligibility meets both prongs of the *Strickland* analysis.

The state habeas court held that trial counsel made a strategic decision not to inform the jury about parole eligibility. The state habeas court concluded that "[t]rial counsel are not ineffective for making the reasonable, strategic decision, based on prior experience, not to request that the jury be informed and instructed concerning parole eligibility, an instruction which would make the jury aware that the eighteen-year old applicant would be eligible for parole at the relatively young age of forty-three." State Habeas Record at 215-16, ¶ 11.[9] The state habeas court's decision was not contrary to, or an unreasonable application of, federal law.

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[9] The Court notes that the state habeas court erred in its mathematical computation of at what age Medellin would be eligible for parole. Nonetheless, the same principle applies whether Medellin would be released in his forties or his fifties—he could still commit a violent crime.

Trial counsel apparently hoped to leave the jury with the impression that a life sentence meant just that—lifelong incarceration. The integrity of trial counsel's choice is reflected in concerns raised by the Fifth Circuit in other cases: that a jury's knowledge that the defendant could one day return to society may " 'predispose[ ] them to impose a death penalty.' " *Woods v. Johnson*, 75 F.3d 1017, 1037 (5th Cir.) (quoting *King v. Lynaugh*, 850 F.2d 1055, 1060 (5th Cir. 1988)), *cert. denied*, 519 U.S. 854 (1996). Indeed, as noted by the Fifth Circuit in another case, the petitioner's

> crime, and his revelry in it, leave no room for hypothesizing that a jury, faced with the information about parole for which [the petitioner] contends, would have been more lenient. If anything, given the egregious nature of this case, a suggestion to prospective jurors that [the petitioner] might return to society in [thirty-five] years could very easily have predisposed them to impose a death sentence.

King, 850 F.2d at 1061. This concern is amplified in this case due to Medellin's youth at the time of the murders. Trial counsel made a choice not to risk the chance that a jury would not view thirty-five years as an appropriate amount of time before parole, and thus return a death sentence.

The Supreme Court has recognized that "[i]n a State in which parole is available, how the jury's knowledge of parole availability will affect the decision whether or not to impose the death penalty is speculative, and we shall not lightly second-guess a decision whether or not to inform a jury of information regarding parole." *Simmons v. South Carolina*, 512 U.S. 154, 168 (1994). Trial counsel based his decision not to inform the jury of parole eligibility on his prior experience and on objectively defensible strategy. As Medellin failed to show that the state habeas court's decision was contrary to or an unreasonable application of federal law, this claim is denied. *See* 28 U.S.C. § 2254(d)(1).[10]

D. *Failure to seek enforcement on appeal of the trial court's order allegedly precluding the State from seeking a death sentence*

Prior to trial, Medellin filed a "Motion to Preclude Prosecution from Seeking the Death Penalty." Tr. Vol. I at 95-107. Medellin's motion argued that Texas should not be permitted to seek the death penalty against him because of various perceived deficiencies in the capital sentencing statute. On September 9, 1994, the trial court held a hearing to address various pre-trial motions. There, the following interchange occurred:

Trial counsel:	Your Honor, could we start with the Motion to Declare the Texas Capital Sentencing Scheme Unconstitutional and Motion to Preclude the Imposition of the Death Penalty because these will probably be—
Trial court:	That will be denied. All right. What else?
Trial counsel:	Then the next one, Your Honor, will be the Motion to Preclude the Prosecution from Seeking the Death Penalty.
Trial court:	That will be denied.

Tr. Vol. 27 at 9. When the trial court signed the defense's proposed order that day, however, the trial judge initialed the line indicating that the motion to preclude the death penalty had been granted. Tr. Vol. I at 108. Neither trial nor appellate counsel seized on the written order as an opportunity to avoid a capital conviction.

Medellin argues that the written order of the trial court was enforceable and should have prevented his capital prosecution. Medellin faults his appellate counsel for not identifying the existence of the challenged order in the record. Medellin contends that appellate counsel rendered ineffective assistance by not asking the Court of Criminal Appeals to vacate his death sentence because the trial court initialed the portion of his written order that would prevent his capital prosecution, even when the trial court clearly evinced on the record the intent to deny the motion.

Medellin raised this claim on state habeas review. There, the same court which presided over his trial issued the following factual finding: "The Court finds, based on its personal recollection, that the written order notation on the applicant's motion to preclude the State from seeking the death penalty is an inadvertent error." State Habeas Record at 204, ¶31.[11] On that basis, the

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[10] The state habeas court also found that Medellin failed to show that he was prejudiced by trial counsel's failure to offer evidence or question about parole eligibility. State Habeas Record at 216, ¶12. Medellin's response to the summary judgment motion relies on studies showing that a jury's correct knowledge of parole eligibility increases the likelihood of them imposing a life sentence. Considering the overwhelming evidence that supported a death sentence in this case, and the brutal nature of the murders, there is no reasonable probability that a jury would return a life sentence had it known about the lengthy time before Medehin would be eligible for parole.

[11] The trial court additionally found "based on the applicant's trial in which the State sought the death penalty and on the applicant's

court denied habeas relief. State Habeas Record at 215, ¶ 8. This conclusion is neither contrary to, nor an unreasonable application of, federal law. *See* 28 U.S.C. § 2254(d)(1).

The state habeas court explicitly found its notation on the written order was inadvertent. This Court must presume that finding to be correct unless Medellin shows clear and convincing evidence to the contrary. *See* 28 U.S.C. § 2254(e)(1). Medellin has not produced any evidence that would suggest that the trial court intended to prevent the State from seeking a death sentence. The record itself, most particularly the interchange where the trial court orally denied the motion, supports the conclusion that the written order reflects an inadvertent error. Nothing would indicate that the trial court meant to prevent the State from seeking a death sentence.

An appellate attorney cannot be faulted for not raising meritless claims. *See United States v. Kimler*, 167 F.3d 889, 893 (5th Cir. 1999) ("An attorney's failure to raise a meritless argument thus cannot form the basis of a successful ineffective assistance of counsel claim because the result of the proceeding would not have been different had the attorney raised the issue."); *Williams v. Collins*, 16 F.3d 626, 634 (5th Cir.), cert. denied, 512 U.S. 1289 (1994). "Failure to raise meritless objections is not ineffective lawyering; it is the very opposite." *Clark v. Collins*, 19 F.3d 959, 966 (5th Cir.), *cert. denied*, 513 U.S. 966 (1994); *see also Green v. Johnson*, 160 F.3d 1029, 1037 (5th Cir. 1998) ("[F]ailure to make a frivolous objection does not cause counsel's performance to fall below an objective level of reasonableness . . ."), *cert. denied*, 525 U.S. 1174 (1999). The trial court obviously made an inadvertent mistake in signing the order upon which Medellin now relies. Appellate counsel had no chance of crafting that into a viable, meritorious appellate argument. The state habeas court's rejection of this claim was not contrary to, or an unreasonable application of, federal law. *See* 28 U.S.C. § 2254(d)(1). This claim is denied.

II. Vienna Convention

Medellin is a citizen of Mexico. Medellin contends that he was never given consular access before, during, or after his trial. Medellin maintains that this denial of consular assistance violated his rights under the Vienna Convention on the Law of Treaties, May 22, 1969, art. 31(1), 8 I.L.M. 4 (1969) ("Vienna Convention"). Because of this denial, Medellin asks this Court to order that a new trial be held.

Medellin presented this claim on state habeas review. The state habeas court held that Medellin failed to object to the violation of the Vienna Convention at trial. On that basis, the state habeas court concluded that his failure to properly preserve the claim waived his right to assert the claim on post-conviction review. State Habeas Record at 210, ¶ 13.[12] Respondent argues that the state habeas court's reliance on an independent and adequate state procedural rule, *i.e.*, Texas' contemporaneous

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resulting death sentence, that the inadvertent error on the written order accompanying the applicant's motion to preclude the State from seeking the death penalty was rendered moot by the applicant's trial and subsequent sentence of death." State Habeas Record at 204, ¶ 33.

[12] The state habeas court also considered the merits of Petitioner's Vienna Convention claim. A state court's alternative adjudication of a claim on the merits does not vitiate the validity of its procedural bar. *See Corwin v. Johnson*, 150 F.3d 467, 473 (5th Cir.) ("It is clear in this Circuit that alternative rulings do not operate to vitiate the validity of a procedural bar that constitutes the primary holding."), *cert. denied*, 525 U.S. 1049 (1998).

objection rule, bars federal consideration of Medellin's Viena Convention claim.

The Fifth Circuit "has consistently held that the Texas contemporaneous objection rule constitutes an adequate and independent state ground that procedurally bars federal habeas review of a petitioner's claims." *Fisher v. State*, 169 F.3d 295, 300 (5th Cir. 1999); *see also Sharp v. Johnson*, 107 F.3d 282, 285-86 (5th Cir. 1997); *Nichols v. Scott*, 69 F.3d 1255, 1280 n.48 (5th Cir. 1995), *cert. denied*, 518 U.S. 1022 (1996); *Amos v. Scott*, 61 F.3d 333, 345 (5th Cir.), *cert. denied*, 516 U.S. 1005 (1995). Medellin, however, argues that Vienna Convention claims are exempt from the constrains of the procedural default doctrine.

In *Breard v. Greene*, 523 U.S. 371 (1998), the Supreme Court considered the effect of the procedural default doctrine on a prisoner's Vienna Convention claim. Recognizing that federal courts "should give respectful consideration to the interpretation of an international treaty rendered by an international court," the Supreme Court nonetheless found that, "absent a clear and express statement to the contrary, the procedural rules of the forum State govern the implementation of the treaty in that State." *Id.* at 375.[13] The Supreme Court held that the procedural default doctrine could bar consideration of a Vienna Convention claim. *See id.* at 375-76. The Supreme Court supported this finding by recognizing that the procedural default doctrine applied

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[13] The Supreme Court noted that "[t]his proposition is embodied in the Vienna Convention itself, which provides that the rights expressed in the Convention 'shall be exercised in conformity with the laws and regulations of the receiving State,' provided that 'said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended.' " *Breard*, 523 U.S. at 375 (quoting Article 36(2), [1970] 21 U.S. T., at 101]).

even to claims brought under the United States Constitution—a document " 'on full parity with a treaty.' " *Id.* ay 376 (quoting *Reid v. Covert*, 354 U.S. 1, 8 (1957)). The Supreme Court also expressed doubt that any Vienna Convention claim could be successful absent "some showing that the violation had an effect on the trial." *Breard*, 523 U.S. at 377 (citing *Arizona v. Fulminate*, 499 U.S. 279 (1991)). The *Breard* decision would allow Medellin's failure to comply with Texas' contemporaneous objection rule to bar federal review of this claim.

Medellin, however, argues that a case decided in the International Court of Justice ("ICJ") abrogates reliance on a procedural bar in rejecting Vienna Convention claims. In the *LaGrand Case* (*Germany v. United States*), 2001 I.C.J. 104, the ICJ found that the procedural default rule itself did not violate the Vienna Convention. *See LaGrand Case*, 2001 I.C.J. 104, at ¶90.[14] The ICJ, however, condemned the application of the procedural default rule when "it prevent[ed] 'full effect [from being] given to the purposes for which the rights accorded under [the Vienna Convention] are intended." *Id.* at ¶91. The ICJ held that, because of "the failure of the American authorities to comply with their obligation" under the Vienna Convention, "the procedural default rule prevented [LaGrand] from attaching any legal significance" to the State's violation of the Vienna Convention. *Id.* According to Medellin, the effect of the *LaGrand Case* is that "procedural default rules may not be invoked to deny merits-based review of [a Vienna Convention] violation." (Docket Entry # 24 at 21).

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[14] The ICJ previously entered an order requiring the United States to ensure that LaGrand was not executed. Arizona executed LaGrand in 1999. The ICJ did not enter its final judgment in the *LaGrand Case* until 2001.

Medellin forfeited consideration of his Vienna Convention claim by failing to comply with an adequate and independent state procedural rule. The Supreme Court has long held that such procedural rules bar federal consideration of defaulted claims, except under narrow exceptions. Medellin's reliance on the *LaGrand Case* would create a wholesale exception to procedural limitations when a petitioner raises Vienna Convention claims—potentially invalidating well-settled law such as the AEDPA's insistence on the exhaustion of remedies and the timely presentation of claims. The concerns of comity, federalism, and finality of state judgements suggest that this Court refrain from jettisoning the procedural bar doctrine until the Supreme Court reconciles its caselaw with the ICJ action in the *LaGrand Case*. This Court is simply wary of finding that the ICJ overruled entrenched Supreme Court precedent.[15]

Even if this Court were to consider the merits of the claim, Medellin is not entitled to federal habeas relief The state habeas court found that Medellin "as a private individual, lacks standing to enforce the provisions of the Vienna Convention." State Habeas Record at 216, ¶15. Federal law supports the state habeas court's rejection of this claim. The preamble to the Vienna Convention explains that it is "not to benefit individuals but to ensure the efficient performance of functions by consular posts on behalf of their respective States . . . ." On that basis, the Fifth Circuit has refused to recognize that the Vienna Convention "creates judicially enforceable rights of consultation between a detained foreign national and his consular office." *United States v. Jimenez-Nava*, 243 F.3d 192, 198 (5th Cir.), *cert. denied*, 533 U.S. 962 (2001).[16] If this Court were to recognize that the Vienna Convention created a personally-enforceable right, such a finding would create a new rule of law, violating the non-retroactivity principle of *Teague v. Lane*. *See Flores v. Johnson*, 210 F.3d 456, 457-58 (5th Cir. 2000) (finding that any recognition of enforceable, individual rights under the Vienna Convention would amount to a new rule of law in violation of Teague's non-retroactivity principle), *cert. denied*, 531 U.S. 987 (2000). The ICJ's rejection of the procedural default doctrine in Vienna Convention cases did not purport to overrule the

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[15] The wisdom in this approach is suggested by the fact that the Supreme Court refused to stay LaGrand's execution, notwithstanding the fact that the ICJ ordered the United States to "take all measures at its disposal to ensure that [LaGrand] is not executed pending the final decision in these proceedings." *LaGrand Case*, 2001 I.C.J. 104, at 32. The Supreme Court's refusal to stay LaGrand's execution raises substantial questions concerning its own view of the ICJ's ability to intrude in American legal proceedings.

[16] In *Beard*, the Supreme Court considered whether the Vienna Convention provided a private, enforceable right. Finding the claim procedurally barred, the Supreme Court did not directly rule on the claim. While the Supreme Court noted that the Vienna Convention "arguably confers on an individual the right to consular assistance following arrest[,]" the Supreme Court left the resolution of that issue to the lower courts. 523 U.S. at 376. Since 1970, the United States Department of State has interpreted the Vienna Convention as not creating enforceable individual rights. *See United States v. Li*, 206 F.3d 56, 63 (1st Cir.), *cent. denied*, 531 U.S. 956 (2000). The federal circuit courts that have considered the issue have generally refused to address the merits of the question, instead finding that the defendant failed to demonstrate prejudice or sought an unavailable remedy. *See United States v. De La Pava*, 268 F.3d 157, 164-66 (2nd Cir. 2001); *United States v. Minjares-Alvarez*, 264 F.3d 980, 986-88 (10th Cir. 2001); *United States v. Page*, 232 F.3d 536, 540 (6th Cir.), *cert. denied*, 532 U.S. 935 (2001); *United States v. Lawal*, 231 F.3d 1045, 1048 (7th Cir. 2000); *United States v. Chanthadara*, 230 F.3d 1237, 1255 (10th Cir. 2000), *cert. denied*, 122 S. Ct. 457 (2001); *United States v. Cordoba-Mosquera*, 212 F.3d 1194, 1196 (11th Cir. 2000), *cert. denied*, 531 U.S. 1131 (2001). No circuit court has held that the Vienna Convention creates valid, enforceable individual rights.

Supreme Court's weighty Teague jurisprudence. This Court, therefore, cannot grant habeas relief on Petitioner's Vienna Convention claim.

Even if procedural law and non-retroactivity principles did not mandate the denial of this claim, and the Court were to assume that the Vienna Convention created an enforceable right, Petitioner would have to show concrete, non-speculative harm for the denial of his consular rights. *See Breard*, 523 U.S. at 377; *Faulder v. Johnson*, 81 F.3d 515, 520 (5th Cir. 1996), *cert. denied;* 519 U.S. 995 (1996). When a Vienna Convention claim is "properly raised and proven, it is extremely doubtful that the violation should result in the overturning of a final judgment of conviction without some showing that the violation had an effect on the trial." *Breard*, 523 U.S. at 377. Medellin contends that the Mexican Consular would have taken immediate steps to secure representation for him and would have advised him not to confess to the rape and murder of the two young girls.

The state habeas court, however, found that Petitioner "fail[ed] to show that he was harmed by any lack of notification to the Mexican consulate concerning his arrest for capital murder; [Medellin] was provided with effective legal representation upon [his] request; and, [his] constitutional rights were safeguarded." State Habeas Record at 217, ¶ 16. Petitioner has not shown that this determination was contrary to, or an unreasonable application of, federal law. *See* 28 U.S.C. § 2254(d)(1). Medellin's allegations of prejudice are speculative. The police officers informed Medellin of his right to legal representation before he confessed to involvement in the murders. Medellin waived his right to advisement by an attorney. Medellin does not challenge the voluntary nature of his confession. There is no indication that, if informed of his consular rights, Medellin would not have

waived those rights as he did his right to counsel. Medellin fails to establish a "causal connection between the [Vienna Convention] violation and [his] statements." *United States v. Ortiz*, 315 F.3d 873, 886 (8th Cir. 2002). Petitioner has failed to show prejudice for the Vienna Convention violation.[17] This claim is denied.

III. *Batson* Claim

Medellin claims that the State violated his constitutional rights through the discriminatory use of peremptory challenges. Medellin first raised the issue of discrimination when the State used a peremptory challenge to excuse potential juror Elizabeth Ann Berry. Medellin raised a *Batson*[18] challenge, contending that the State only struck Ms. Berry because she was an African-American woman. Tr. Vol. 20 at 227. After Medellin raised the *Batson* challenge, the following exchange occurred:

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[17] Furthermore, Petitioner has not demonstrated that a new trial would bean appropriate remedy under the Vienna Convention. The Vienna Convention does not articulate a specific remedy for its violation. *See Jimenez-Nava*, 243 F.3d at 199. Federal courts generally hold that Vienna Convention violations do not require the dismissal of an indictment or the suppression of evidence. *See De La Pava*, 268 F.3d at 164-66; *Page*, 232 F.3d at 540-41; *Cordoba-Mosquera*, 212 F.3d at 1195-96; *Li*, 206 F.3d at 61-62. The Fifth Circuit has held that reversal is not an appropriate remedy when trial counsel had access to the same information as consular officials. *See Faulder*, 81 F.3d at 520. The Fifth Circuit has also rejected the suggestion that the exclusionary rule should prevent the introduction of confessions taken in violation of the Vienna Convention. *See Jimenez-Nava*, 243 F.3d at 197-98. No court has reversed a capital conviction or set aside a death sentence on the basis of a Vienna Convention violation. This Court questions its ability to overturn Medellin's conviction and sentence under the Vienna Convention, especially in light of his failure to demonstrate prejudice.

[18] *Batson v. Kentucky*, 476 U.S. 79 (1986).

Trial court: Mr. Millin, that's plenty. If you want to put something in rebuttal, that's fine. But there's a Batson challenge on the table. Mr. Vinson, do you want to go ahead and—I will ask that the State, regardless of a prima facie showing, put its explanation on the record at this time because its fresh in everybody's mind. Mr. Millin, if you want to reurge your Batson motion at a later time. The jury (sic) is not clearly the reason of selecting a capital murder jury.

The State: I guess the main issue and problem that I have with Ms. Berry is that she has two brothers of which both have been involved in drugs. Both have been to the penitentiary. One, I think, has been on numerous occasions, she testified to. And I think one is released on parole at this time and one is in custody at the penitentiary at this time as well. Moreover, I did not feel comfortable with Mrs. Berry's characterization of the prosecutors as on the attack and defense attorneys as being the underdog. And throughout this trial, I would have a perception in my mind to present my case to Mrs. Berry, she's looking at the defendant as the underdog and I'm the one on attack, like a wild mongrel.

Tr. Vol. 20 at 227-28. The prosecutor also provided relevant personal information relating to his choice of strikes:

The State: Moreover, your Honor, the record as been silenced on my color. The prosecutor in this case, I would like the record to reflect is a black prosecutor and has an appreciation of blacks serving on juries, having grown up during the 40's, 50's, 60's, 70's, 80's, and 90—

Trial court: Are you saying you're an old black prosecutor?

The State: That's right.

Trial court: Let the record reflect that Mr. Vinson is African American and he is old. However, he is—

The State: And youthful in appearance.

Trial court: However, he looks much younger than his years.

Tr. Vol. 20 at 228-29. In rebuttal, the defense argued that Mrs. Berry expressed an ability to be impartial notwithstanding her brothers' criminal record. Tr. Vol. 20 at 229. The trial court then denied the *Batson* challenge to Mrs. Berry as follows:

Trial court: Let me state that I do not believe that there's a prima facie showing that's been made at this time. However, I find based on observing Ms. Berry's demeanor and her responses and viewing her questionnaire, that Mr. Vinson's reason[s] proffered are

> racial, neutral reasons. At this time, I will deny any Batson motion. If you'd like to, Mr. Millin, reurge your Batson challenge at the end of the jury selection, I will reconsider it at that time as well. However, let the record reflect at this time-still at this time, our nine-man jury is comprised of a black female, a Hispanic male, a Hispanic female, a black male. . . . And so there's no indication of gender bias. There are—the composition of males to females are a black female, a white female, a Hispanic female, a white female; and with regard to men, Hispanic male, a white male, a black male, and a second white male.

Tr. Vol. 20 at 230-3 1.

Medellin next raised a peremptory challenge when the State excused potential juror Rafael Rodriguez with a peremptory strike. The trial court found that Medellin made a prima facie case for the purposes of *Batson* by noting that the potential juror was Hispanic and had generally stated that he could be impartial. Tr. Vol. 21 at 117. The State then explained the motivation for striking Mr. Rodriguez:

> The State: My reason for striking Mr. Rodriguez is there was a great deal of hesitation with his explanation on the death penalty when he was speaking with you. He's also for the death penalty without any compulsion whatsoever if it happened to one of his relatives. I still do not have a full understanding of his position on the death penalty. With respect to the question I asked him, he gave me a philosophical—he gave a theological and Biblical and his own philosophy. One of the things put me on edge, turning the cheek, you turning the other cheek. That goes back to the philosophy if you're slapped, you turn the other cheek. I'm afraid he may be looking to turn the other cheek in this case, and I don't want it turned in my favor.

Tr. Vol. 21 at 117-18. The trial court found that to be a race-neutral explanation and denied the *Batson* challenge. Tr. Vol. 21 at 118.

After the parties selected the jury panel, Medellin filed a "Motion to Strike Jury Panel." Tr. Vol. I at 260. According to Medellin's count, the State struck eight men and five women. Five of those excluded white, six were black, and two were Hispanic.[19] Medellin argued that the State based its voir dire strategy on removing minorities and men from the jury panel.

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[19] In his motion, Medellin noted that the State exercised its peremptory challenges against the following prospective jurors: Kirven O'Neal Tillis, a black male; Mary Freeman, a white female; Kathy Felder, a black female; Bernard Richardson, a black male; Walter Wynn Martin, a white male; Andra McCoy, a black male; Marie Clark, a white female; Vastine Dickie, a black male; Christine Rossie, a white female; Raford Earl Gresham, a white male~~; Porfi~~rio Rodriguez, a hispanic male; Elizabeth Ann Berry, a black female; and Rafael Rodriguez, a hispanic male. Tr. Vol. I at 264.

On August 17, 1994, the trial court discussed Medellin's motion to strike the panel in a pretrial hearing. In that hearing, the defense asked the court to quash the entire panel because the State allegedly used its peremptory challenges in a discriminatory manner. Tr. Vol. 26 at 11-12. The State responded to that allegation:

> The State: Your Honor, I think the record will reflect too the final disposition of that jury again is a melting pot jury. And while the State exercised those strikes, I think it was 13—I don't have mine with me right now. But those are all race neutral strikes.

Tr. Vol. 26 at 12-13. At that point, the trial court went off the record. The record from that hearing does not reflect any further on-the-record discussion of the *Batson* issue. On August 19, 1994, the trial court entered a written order denying Medellin's motion to strike the jury panel. Tr. Vol. I at 267.

A. *Claim raised on direct review*

On direct appeal, Medellin raised a single Batson claim. Medellin argued that the State violated the equal protection clause with respect to the peremptory strike of Mr. Rodriguez.[20] The Court of Criminal Appeals recognized that the trial court found that Medellin made a prima facie case for discrimination. Opinion at 12. The Court of Criminal Appeals then noted that the State gave a race-neutral explanation for the challenge to Mr. Rodriguez: that his opinion on the death penalty would not make him an attractive juror for the State. Opinion at 12. The Court of Criminal Appeals found that

> [t]he trial court accepted these reasons as race-neutral and appellant made no attempt to rebut the explanations given or otherwise explain why they were only pretexts for discrimination. A review of the entirety of the veniremember's voir dire reveals that the prosecutor's reasons were supported by the record. Given this, we cannot say that the judge's ruling in this instance was clearly erroneous.

Opinion at 12.

Medellin renews his *Batson* claim against Mr. Rodriguez in his federal petition. Medellin argues that the lack of clarity in Mr. Rodriguez's opinion on the death penalty does not provide a race-neutral basis for a peremptory strike. Medellin argues that the trial court should have required additional questioning of Mr. Rodriguez. The record indicates, however, that the peremptory strike of Mr. Rodriguez complied with the Supreme Court's *Batson* jurisprudence.

Under *Batson v. Kentucky*, 476 U.S. 79 (1986), the State violates the equal protection clause when it challenges potential jurors solely on the basis of race. A court addresses *Batson* claims under a three-step burden shifting scheme:

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[20] Medellin raised this claim under *Batson* and under the relevant state statute prohibiting the use of race-based peremptory challenges. While the Court of Criminal Appeals found that Medellin failed to preserve error on his state law claim, the Court of Criminal Appeals considered the merits of his *Batson* argument. Apparently anticipating that Respondent would rely on the procedural default doctrine to bar this claim, Medellin now argues that appellate counsel rendered ineffective assistance by failing to present a broad *Batson* claim on direct review. Medellin has not shown that he was prejudiced by this failure. Aside from the fact that he fails to show that a *Batson* violation actually existed, Medellin presented the *Batson* claim on state habeas review where it received full consideration by the Court of Criminal Appeals. The state habeas court rejected that claim. There is no reason to suppose that the claim would have fared better on direct review. Medellin fails to show *Strickland* prejudice with respect to the ineffective-assistance-of appellate counsel nuance of his *Batson* claim.

> [t]he process for evaluating an objection under *Batson* requires that (1) a defendant make a prima facie showing that the prosecutor has exercised his peremptory challenges on the basis of race, (2) the burden then shifts to the prosecutor to articulate a race-neutral reason for excusing the juror in question, and (3) the trial court must determine whether the defendant has carried his burden of proving purposeful discrimination.

Thompson v. Cain, 161 F.3d 802, 810-11 (5th Cir. 1998); *see also United States v. Montgomery*, 210 F.3d 446, 453 (5th Cir. 2000); *United States v. Bentley-Smith*, 2 F.3d 1368, 1373 (5th Cir. 1993). " 'The 'shifting burden' described in the *Batson* framework is one of production only.' The party asserting the claim of purposeful discrimination always shoulders the ultimate burden of persuasion." *Soria v. Johnson*, 207 F.3d 232, 239 (5th Cir.) (quoting *Bentley-Smith*, 2 F.3d at 1373), *cert. denied*, 530 U.S. 1286 (2000); *see also Lockett*, 230 F.3d at 707 (citing *Batson* and stating that "[t]he burden of demonstrating that a constitutional violation occurred is, or course, on a habeas petitioner.").

In the instant case, the trial court called on the State to provide a race-neutral explanation for the use of the peremptory strike against Mr. Rodriguez. "Once a court has taken that step, we no longer examine whether a prima facie case exits." *United States v. Webster*, 162 F.3d 308, 349 (5th Cir. 1998), *cert. denied*, 528 U.S. 829 (1999). This Court's "decision, then, must rest on (1) whether the government articulated race-neutral explanations for the exercise of its challenges and (2) whether

[the petitioner] has demonstrated that those justifications are pre-textual and that the government engaged in purposeful discrimination." *Id.*

As previously noted, the State offered several reasons for its peremptory strike of Mr. Rodriguez that were not based on his race. Under the second part of the *Batson* burden-shifting scheme, "[u]nless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." *Purkett v. Elem*, 514 U.S. 765, 768 (1995) (finding the prosecution's explanation that the potential juror had long hair and a beard to be a sufficient race-neutral explanation for the purposes of the second step of the *Batson* analysis); *see also Hernandez v. New York*, 500 U.S. 352, 359-60 (1991).[21] "In such cases, a 'legitimate reason' is not a reason that makes sense, but a reason that does not deny equal protection." *Id.*; *see also Miller-El*, __ U.S. at __, 123 S. Ct. at 1040 ("In that instance the issue comes down to whether the trial court finds the prosecutor's race-neutral explanations to be credible.").

Medellin now disputes the reasons proffered by the State, pointing to Mr. Rodriguez's testimony in an attempt to show that the State's reasons were baseless or warranted further questioning. "[T]he ultimate inquiry for the judge is not whether counsel's reason is suspect, or weak, or irrational, but whether counsel is telling the truth in his or her assertion that the challenge is not race-biased." *Bentley-Smith*, 2 F.3d at 1375. In *Batson* the Supreme Court noted that the finding of intentional discrimination is a factual finding that "largely will turn on evaluation of credibility." *Batson*, 476 U.S. at 98 n.21. In making such determinations, the trial court evaluates the State's explanation, but also observes the demeanor of the prosecutor and the prospective jurors. *See Jones v. Butler*, 864 F.2d 348, 369 (5th Cir. 1988), *cert. denied*, 490 U.S. 1075 (1989); *Hernandez*, 500 U.S. at 365 (stating that "the best evidence often will be the demeanor of the attorney who exercises the challenge"). "Credibility can be measured by, among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy." *Miller-El*, __ U.S. at __, 123 S. Ct. at 1040. In essence, "the decisive question will normally be whether a proffered race-neutral explanation should be believed." *Bently-Smith*, 2 F.3d at 1373.

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[21] "Under *Batson*, a prosecutor's explanation for a peremptory strike need not rise to the level of a challenge for cause; rather, it merely must contain a clear and reasonably specific articulation of legitimate reasons for the challenge." *United States v. Clemons*, 941 F.2d 321, 325 (5th Cir. 1991). At the second step, the "race-neutral explanation tendered by the proponent need not be persuasive, or even plausible." *United States v. Huey*, 76 F.3d 638, 641 (5th Cir. 1996). Indeed, the explanation "simply must be race-neutral and honest." *Webster*, 162 F.3d at 349.

A state court's credibility determinations are afforded "significant deference" on federal review, especially in light of the AEDPA. *See Miller-El*, __ U.S. at __, 123 S. Ct. at 1041.[22] Under the AEDPA, a petitioner bears the substantial burden of showing that a state court erred in its credibility determination. *See id.* at __, 123 S. Ct. at 1041-42. This Court is bound by the factual findings of the Court of Criminal Appeals unless Medellin can demonstrate by clear and convincing evidence that the

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[22] This deference does not suggest an abdication of judicial review. *See Miller-El*, __ U.S. at __, 123 S. Ct. at 1041. A federal court may reject a state credibility finding so long as a petitioner complies with the AEDPA's stringent standards. *See id* at __, 123 S. Ct. at 1041.

presumption of correctness should not apply. *See* 28 U.S.C. § 2254(e)(1).

Under *Batson's* final step, Medellin ultimately bears the burden of establishing that the government engaged in "purposeful discrimination" based on race. *Purkett*, 514 U.S. at 767; *Bentley-Smith*, 2 F.3d at 1373. Here, Medellin "offers no direct evidence of purposeful discrimination, but rather argues that the government's proffered reasons are pretextual. . . ." *Id.* Medellin attempts to prove his case by demonstrating an absence of record support for the reasons offered by the State; however, even if the reasons advanced by the State are only weakly supported by the record, the thrust of this Court's analysis concerns the State's intent in seeking the peremptory strike. *See Bently-Smith*, 2 F.3d at 1373-74 (stating that as a general rule, "[t]here will seldom be any evidence that the claimant can introduce—beyond arguing that the explanations are not believable or pointing out that similar claims can be made about non-excluded jurors who are not minorities"). While Medellin now asks this Court to find that the reasons advanced by the State during jury selection were pretextual, he must also demonstrate that the State engaged in purposeful discrimination on the basis of race or gender. The record supports a finding that the State did not exercise its peremptory challenge on account of race or gender. The State struck Mr. Rodriguez for his opinion on the death penalty. That excuse is sufficiently race-neutral to survive a *Batson* challenge.

After a review of the record, this Court finds Medellin has not demonstrated why the deference to the trial judge's implicit determination concerning the prosecution's intent should be called into doubt. Accordingly, Medellin has not provided clear and convincing evidence that the state court findings were incorrect. *See* 28

U.S.C. § 2254(e)(1). Medellin has also failed to demonstrate that the state court's decision rejecting the *Batson* claim against Mr. Rodriguez was "an unreasonable determination of the facts in light of the evidence. . . ." 28 U.S.C. § 2254 (d)(2).

B. *Claim raised on state habeas review*

On state habeas review, Medellin raised the expansive *Batson* claim which he now presents in his federal petition. As opposed to the challenge to Mr. Rodriguez's dismissal raised on direct review, Medellin's state habeas claim broadly challenged the State's motive in exercising all of its peremptory challenges. Medellin argued that he made a prima facie showing that the State's practice in jury selection was to remove all African American and male jurors. To establish the alleged pattern of discriminatory strikes, Medellin relied only on the fact that the State used six of its thirteen peremptory strikes to remove minority potential jurors and also used eight to excuse men, resulting in a pattern of discriminatory strikes. Medellin also criticized the trial court for not making the State provide a race-neutral reason for each of those strikes when he raised the issue after the impanelment of the jury.

The state habeas court rejected this claim. The state habeas court first reviewed the voir dire of Elizabeth Ann Berry, the only potential juror other than Mr. Rodriguez specially identified by Medellin on habeas review as being subject to a discriminatory strike. The state habeas court found that the State's explanation for striking Ms. Berry, that she had brothers who were incarcerated and displayed a manner favoring the defense, was race neutral. State Habeas Record at 199, ¶¶5-9, 11. The state habeas court also relied heavily on the prosecutor's credibility. The state habeas court noted that the prosecutor was himself black. State Habeas Record at 200, ¶10. The state habeas court specifically noted previous cases in which the prosecutor had exercised peremptory challenges without discriminatory motive. State Habeas Record at 202-03, ¶¶25-26.

The state habeas court concluded that Medellin's motion in which he merely described the composition of the peremptory strikes failed to establish a prima facie case of discrimination. State Habeas Record at 213, ¶3. The state habeas court found that the prosecution employed racially-neutral strikes. State Habeas Record at 214, ¶¶4-5. Accordingly, the state habeas court also found that appellate counsel's failure to raise a broad *Batson* claim on direct review did not violate Medellin's constitutional rights. State Habeas Record at 214, ¶7.

The state habeas court's decision on this issue was not unreasonable in light of the facts of this case. Medellin based his arguments to the trial court only on an alleged pattern of strikes used by the State. Those strikes, however, did not demonstrate a markedly disproportionate application against members of a particular racial group or gender. The composition of the jury in this case does not suggest the exclusion of a cognizable group. The state habeas court found that Medellin did not make a prima facie case for discrimination; this Court agrees.[23]

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[23] Medellin argues that he made a prima facie case for discriminatory intent, but also claims that the State did not provide any race-neutral explanation for its strikes. Generally, once a State provides a race-neutral explanation the question of whether a defendant has made a prima facie case becomes moot. *See Ladd v. Cockrell*, 311 F.3d 349, 355 (5th Cir. 2002). Here, the trial court did not ask the State to explain its strikes; the State addressed the defense's objection on its own initiative. Tr. Vol. 26 at 12. The State's explanation, that the jury represented a "melting pot," challenged the establishment of a prima facie case.

After the State challenged the defense's prima facie case, the trial court went off the record. The record is silent as to whether the trial court and the parties continued discussing the *Batson* challenge. Medellin has not provided affidavit or other evidence that would indicate what transpired during the off-the-record discussion. The discussion, however, is of no moment. Medellin has failed to make a prima facie case of discrimination, both in state and federal court. While a *Batson* challenge may rest on either the discrete circumstances of a particular strike or a showing of historic, systemic discrimination, *see Batson*, 476 U.S. at 96, Medellin only shows that, while accepting minority and male jurors, the State struck some African-Americans and men. He has not shown a "pattern of strikes" against a protected group. *See id.* at 97. The absence of a pattern is evident from the fact that at least four minorities and an equal number of men and women served as jurors at trial.

The state court also made a credibility determination that must be presumed correct under 28 U.S.C. § 2254(e)(1). The state habeas court, based on its experience with the prosecutor and on its observation of the proceedings, found that the State did not engage in discrimination. Medellin makes no showing to the contrary. The record before the Court would suggest that the state determination is correct. The state court's rejection of this claim was not unreasonable. *See* 28 U.S.C. § 2254(d)(2). This claim is denied.

IV. *Brady* Claim

Medellin contends that the State failed to disclose material evidence before trial. Medellin argues that the State violated his constitutional rights by not disclosing the fact that one witness at trial, Joe Cantu, had previously been arrested for an unrelated charge that had been

dropped. Medellin assumes that the State dropped the charges in exchange for his trial testimony. Also, Medellin argues that the State failed to disclose important impeachment evidence by not passing along the fact that Joe Cantu and his wife unsuccessfully sought compensation and protection from the police in return for their testimony.

A. *Background*

Before trial, Medellin requested that the State turn over any exculpatory evidence, including "[a]ny 'deals,' whether expressly written or implied, to any individual who agrees to testify for the State in this case." Tr. Vol. I at 44, 67-74. In an August 17, 1994, pre-trial hearing, the State agreed to "run out of an abundance of precaution the criminal records of any witnesses." Tr. Vol. 26 at 28. The trial court also ordered the State to provide the defense with information about any witness' "final convictions and felonies," along with any witness' placement on deferred adjudication. Tr. Vol. 26 at 29. The, trial court then questioned the need for disclosure of arrest records:

Trial court:	Why would arrest records be relevant?
Trial counsel:	Well, Your Honor, it could possibly go to any kind of agreements that could possibly have been made. I certainly don't believe there are any.
Trial court:	You have a separate motion for that?

Trial counsel: Right. But that's why it could possibly be relevant in this motion as well.

Trial court: Well, the arrest records I don't believe are relevant except and to the extent that they provide the basis for some type of an agreement by the District Attorney's Office. So articulate some reason why they might be or some bias

Trial counsel: In other words, if somebody has a case dismissed in order that he might testify.

Trial court: I think your Motion to Disclose or to Reveal the Agreements—

Trial counsel: That covers—that should cover it.

Trial counsel: So then denied as to the arrest records and granted as to the conviction records, is that correct?

Trial court: Yes. And the conviction includes things like deferred adjudication and probation and, of course, your Brady Motion covers all of this. So if there is something that is somehow exculpatory about an arrest—

Trial counsel: The State's witness—

Trial court: Right. Or if it reveals some type of bias on the part of the witness, I expect that it should be disclosed under—

Trial counsel: Under Brady.

The State: Okay.

Trial court: Okay.

Tr. Vol. 26 at 30-31. In that hearing, the parties also discussed the fact that the State had assured that it made no agreements with the witnesses in this case. Tr. Vol. 26 at 32-33.

On state habeas review, Medellin claimed that the State failed to disclose the arrest of Joe Cantu for making terroristic threats.[24] At trial, Joe Cantu and his wife Christina related statements made to them by Medellin after he participated in the rape and murder of the two young victims. Joe and Christina Cantu's testimony helped establish Medellin's precise role in the girls' death. Trial counsel asked Joe Cantu at trial whether he had entered into any deal in exchange for his testimony:

Trial counsel: Have you, Mr. Cantu, received anything from the State in the way of any assistance, anything like that, to secure your presence as a witness?

Mr. Cantu: I don't understand your question.

Trial counsel: Have you been given anything by the State in order for you to be available to testify?

Mr. Cantu: Just that I won't be prosecuted for anything that I say.

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[24] Joe Cantu was the brother of one of Medellin's co-defendants and a former member of Medellin's gang.

Trial counsel And did the State talk to you about the possibility of you being prosecuted for you pawning that stolen necklace?

Mr. Cantu: No.

Trial counsel: They did make an agreement not to prosecute you if you did testify?

Mr. Cantu: They didn't say nothing about that.

The State: We made no agreement with this—

Trial court: Approach the bench.

(WHEREUPON, there was a discussion held off the record outside the hearing of the court reporter)

Trial counsel: So, anyway, Mr. Cantu, you testified that it was agreed that you wouldn't be prosecuted for anything you said today; is that right?

Mr. Cantu: Not today but in the previous—

Trial counsel: Okay. In the previous—you've already testified in several trials; is that right?

Mr. Cantu: Right.

Tr. Vol. 30 at 544-45. Medellin argues that Joe Cantu lied; he contends that evidence produced during the state habeas proceedings shows that the State entered into a deal to secure Mr. Cantu's testimony.

Medellin bases his claim on an affidavit from Christina Cantu. Christina Cantu's affidavit describes information about her and her husband's testimony that was not presented to the defense. Christina Cantu describes how she asked the prosecution about the possibility of a reward in exchange for their testimony, but states that the police told her that the available award money in this case went to another individual. Christina Cantu also states that the State promised her "protection as a witness," but that "never occurred." Because of that, she was "physically beaten at school several times." Christina Cantu also provides details about Joe Cantu's arrest for making terroristic threats:

> Around the time that Jose Medellin went to trial, my husband, Joe Cantu, was arrested for threatening to blow up his place of employment, American Plasma. Joe's brother, Rudy Cantu, informed me of this arrest. I contacted Gail Hayes of the Harris County District Attorneys Office and she stated she was aware of Joe's arrest. Joe was in jail for two days. When he was released he informed me that he spoke with Gail Hayes and that she contacted an attorney for him. I know that Joe went to court one time on this case, but I do not believe he was ever charged or paid a fine. I have never informed anyone about Joe's arrest.

(Docket Entry # 12, Exhibit E). Medellin supports the information contained in Christina Cantu's statement with an affidavit from his trial counsel, Linda Mazzagatti. Trial counsel states that

> With respect to Joe Cantu and Christina Cantu, [current federal habeas counsel] asked me whether I remembered receiving any information, from the District Attorney's Office or elsewhere, that Jose Cantu was arrested for threatening to blow up his place of employment. I have no independent memory of ever learning such information, and my records do not reflect such information.

(Docket Entry # 12, Exhibit G). An investigator's affidavit indicates that the State filed charges against Joe Cantu on June 23, 1994, and then dismissed those charges due to insufficient evidence shortly before Medellin's trial. (Docket Entry # 12, Exhibit I).

Medellin argues that the existence of a deal between the State and Joe Cantu requires reversal of his conviction. Medellin states that

> Joe Cantu's testimony in particular appeared to be credible because he testified against his brother and friends, for no discernable reason. However, had the jury learned that Joe Cantu and Christina were expecting "witness protection," considering the possibility of a reward, currently charged with a criminal offense and represented by an attorney secured by the prosecutors, reasons for the Cantu's testimony. Clearly, such impeachment information was "material" in this case.

(Docket Entry # 12 at 39-40).

In state habeas court, the State produced an affidavit from the prosecutor in this case. The prosecutor stated that he did not enter into any agreements with the Joe or Christina Cantu in exchange for their testimony. State Habeas Record at 108. The prosecutor stated that "I was not involved in Joe Cantu's misdemeanor case and had nothing to do with the ultimate disposition of his case." State Habeas Record at 108. The prosecutor affirmed that he made no promise to the Cantus for a reward in exchange for their testimony. State Habeas Record at 108. Marie Munier, a prosecutor from one of Medellin's co-defendants also submitted a statement wherein she related that she knew about Joe Cantu's arrest, but did not make any deals with him in exchange for his testimony. State Habeas Record at 111. That prosecutor

stated that she made no promise for a reward in exchange for Joe and Christina Cantu's testimony. State Habeas Record at 111.

The State also submitted an affidavit from Gail Hayes, an investigator who worked for the Harris County District Attorney's Office. Ms. Hayes stated that in her investigation of this case "Joe and Christina Cantu asked me about the Crime Stoppers reward money. Subsequently, I learned that the Crime Stoppers money had been given to Christina's sister. I never promised or made assurances to either Joe or Christina Cantu that they would receive any reward money in exchange for cooperation or testimony." State Habeas Record at 114-15. Ms. Hayes also stated that she did not promise any protection or deal to Mr. or Mrs. Cantu in exchange for their testimony. State Habeas Record at 115. Ms. Hayes also addressed the question of Joe Cantu's arrest:

> Prior to trial, Christina Cantu telephoned me and told me that Joe Cantu had been arrested. Joe Cantu was working at a plasma clinic, got into an argument with someone, made a statement about "blowing the place up," and was subsequently arrested. I informed Marie Munier about Joe Cantu's arrest either that night or the next business day. I have no knowledge of any events concerning Joe Cantu's arrest after that time. I did not recommend a lawyer or give any lawyer's name to either Christina or Joe Cantu. I made no promises concerning the disposition of Joe Cantu's case or concerning his incarceration. I was not aware of the disposition of Joe Cantu's arrest until I talked with Assistant District Attorney Roe Wilson in December, 1999.

State Habeas Record at 115. The State also submitted an affidavit from Joni M. Vollman, the prosecutor in Joe

Cantu's terroristic threat case. That prosecutor testified that the State did not make any deal with Joe Cantu in exchange for dismissing the charges against him. Instead, the State dismissed the terroristic threat case for a lack of evidence. State Habeas Record at 172. This testimony is confirmed by a copy of the State's Motion to Dismiss in that case. State Habeas Record at 220. The motion indicates that the charges were dismissed for "insufficient evidence." State Habeas Record at 220.

The state habeas court rejected Medellin's claim that the State violated his constitutional rights by not disclosing material exculpatory information prior to trial. The state habeas court reviewed the affidavits submitted by the State and found each to be credible. State Habeas Record at 210-21, ¶57-62. Finding the information contained in those affidavits did not indicate the existence of any deal between the State and Joe Cantu that resulted in the dismissal of his misdemeanor charge, the state habeas court issued the following legal conclusion:

> The applicant fails to show that there was any deal between the State and Joe and Christina Cantu; thus, the applicant fails to show that the State did not disclose material evidence, i.e., a non-existent agreement between Joe and Christina in exchange for their testimony during the applicant's trial. The applicant fails to show that the State did not disclose a non-existent agreement or any alleged favorable and material information in the instant case. United States v. Agurs, 427 U.S. 97, 96 S. Ct. 2392 (1976); United States v. Bagley, 473 U.S. 667, 105 S. Ct. 3375 (1985) (holding that evidence is material where there is a reasonable probability that, if disclosed, result of the proceeding would have been different). The applicant fails to show that he was denied due process under U.S. Const. amend. XIV and Tex. Const. art. 1, § 10.

State Habeas Record at 217-18 ¶18. Medellin is entitled to habeas relief if the state court's rejection of his claim was contrary to, or an unreasonable application of, federal law. *See* 28 U.S.C. § 2254(d)(1). Medellin has failed to support his AEDPA burden with respect to this claim.

B. *Legal standard*

"[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *see also Little v. Johnson*, 162 F.3d 855, 861-62 (5th Cir. 1998), *cert. denied*, 526 U.S. 1118 (1999). There are three elements required for a valid *Brady* claim: (1) the prosecution must suppress or withhold evidence, (2) which is favorable to the defense, and (3) material to either guilt or punishment. *See United States v. Lowder*, 148 F.3d 548, 550 (5th Cir. 1998); *In re Smith*, 142 F.3d 832, 836 (5th Cir. 1998); *East v. Johnson*, 123 F.3d 235, 237 (5th Cir. 1997). Evidence is "material" under *Brady* if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would be different. *See Williams v. Puckett*, 283 F.3d 272, 279 (5th Cir. 2000), *cert. denied*, __ U.S. __, 123 S. Ct. 504 (2002).

C. *Failure to prove the existence of Brady material*

The thrust of Medellin' argument is that the State should have disclosed the existence of a deal wherein Joe Cantu's terroristic threat charge would be dropped in exchange for his testimony. Yet Medellin has never presented concrete evidence that such an agreement existed. Instead, Medellin rests his argument on the speculation that the State dismissed that charge as part of a secret deal. "Such speculation does not support a *Brady* claim." *Hughes v. Johnson*, 191 F.3d 607, 630 (5th Cir.1999), *cert. denied*, 528 U.S. 1145 (2000); *see also United States v. Dierling*, 131 F.3d 722, 736 (8th Cir. 1997) ("Mere speculation that the government had exculpatory evidence is an insufficient basis for a Brady claim . . . ."), *cert. denied*, 523 U.S. 1066 (1998); *United States v. Van Brocklin*, 115 F.3d 587, 594 (8th Cir. 1997) ("Mere speculation that materials may contain exculpatory evidence is not, however, sufficient to sustain a Brady claim."), *cert. denied*, 523 U.S. 1122 (1998). Medellin's claim is based on nothing more than insinuation. Medellin has not presented any factual allegation that would call into doubt the state habeas court finding that there was no deal with Joe Cantu.

Medellin's argument rests largely on the supposition that there must have been a deal because the State did not try Joe Cantu after his misdemeanor arrest. This argument fails to acknowledge the record evidence that strongly shows that charge was dismissed for insufficient evidence. Medellin has not produced any clear and convincing evidence that would show otherwise, and has failed to produce any competent summary judgment evidence that would demonstrate the existence of a "deal," much less the suppression of a "deal" by the State. Habeas relief is unavailable on *Brady* claims based only on unsupported inferences.

Further, habeas relief is unavailable on the claim that the State failed to divulge Joe Cantu's arrest, independent of any deal. Through pretrial motions, the defense requested that the State provide information about the

arrest record of its witnesses. However, in the pretrial hearing the defense agreed that the State would only turn over information about felony arrests and convictions. Tr. Vol. 26 at 28-31. It is undisputed that Joe Cantu had been arrested for a *misdemeanor* charge. As the defense agreed to the limitation of disclosure to felony offenses and convictions, Medellin cannot complain now that he did not know about Joe Cantu's arrest.

D. Failure to prove materiality

Even accepting as true Medellin's claim that the State failed to disclose information concerning Joe Cantu's arrest, his "deal," and the Cantus' request for a reward from Crime Stoppers and physical protection, he has failed to show materiality under *Brady*. The materiality standard for *Brady* claims focuses on whether "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *United States v. Bagley*, 473 U.S. 667, 682 (1985). The failure to provide the defense with the challenged information, insofar as it is correct, did not "put the whole case in such a different light as to undermine confidence in the verdict." *Kyles v. Whitley*, 514 U.S. 419, 435 (1995); *see also Strickler v. Greene*, 527 U.S. 263, 290 (1999) (fording evidence to be not material if there is only "a reasonable possibility that either a total, or just a substantial, discount of [a witness's] testimony might have produced a different result").

Medellin is correct in noting that the State placed great importance on Joe and Christina Cantu's testimony at trial. Nonetheless, they did not come before the jury unblemished. Trial testimony made the jury aware that the both had long participated in gang activity. Joe had been a member of the same gang as Medellin; Christina belonged to the "Heights" gang whose primary objective was "[s]tealing cars, jumping people." Tr. Vol. 29 at 433. The jury knew that Joe and Christina Cantu had destroyed physical evidence related to the murders and had pawned some of the victims' jewelry. The jury would not be surprised at the production of a criminal arrest record or at the presence of additional motives for testifying. Even so, the jury also knew that Joe Cantu agreed to testify against his own brother and that the Cantus had reasons to come forward other than for personal gain. In other words, the introduction of the information that Medellin claims was suppressed would have had little impeachment value.

In addition, substantial and convincing evidence of Medellin's role in the murders existed independent from the testimony from Mr. and Mrs. Cantu. A member of the gang who left before they began raping the girls placed Medellin at the scene of the murders. Tr. Vol. 28 at 235-37. Medellin gave some of the victims' jewelry to his girlfriend. Tr. Vol. 31 at 743-50. Most importantly, Medellin confessed to the rape and murder of the two girls. In highly disparaging language, Medellin described his involvement in the tortuous rapes and killings. Medellin's confession admitted, at a minimum, to his sexual assault of the victim for whose death he was convicted. Also, his confession admitted that he "h[eld] one end of the shoe lace" used to strangle the victim. Simply, "[t]he record provides strong support for the conclusion that petitioner would have been convicted of capital murder and sentenced to death, even if [Joe and Christina Cantu] had been severely impeached." *Strickler*, 527 U.S. at 294. There is no reasonable probability of a different outcome had the defense received the information that Medellin claims was withheld.

The state court did not unreasonably conclude that Medellin failed to establish that a constitutional violation tainted his trial. *See* 28 U.S.C. § 2254(d)(1). This claim is denied.

V. Exclusion of Potential Juror

Medellin challenges the trial court's exclusion of potential juror Rosie L. Mackey for cause. When asked by the trial court whether she had any opposition to the death penalty she answered: "Religious beliefs. Thou shall not kill." Tr. Vol. 18 at 215. Ms. Mackey acknowledged a conflict: "I could follow the law; but, like I say, it's my religious belief. The law says one thing, and the religious belief says another." Tr. Vol. 18 at 216. Nonetheless, she indicated that she could impose a death sentence "if the evidence called for it." Tr. Vol. 18 at 216.

The State then questioned Ms. Mackey. The State focused on the statement in Ms. Mackey's jury questionnaire that she was "opposed to capital punishment under any circumstances." Tr. Vol. 18 at 218. She also indicated that she did not want to serve as a juror because of her religious convictions. Tr. Vol. 18 at 219. Ms. Mackey affirmed that her religious beliefs would impair her ability to return a death sentence in this case, and that, in fact, she would try to find a way to give a life sentence. Tr. Vol. 18 at 221-23.

Trial counsel then questioned Ms. Mackey about her ability to serve as an impartial juror. Ms. Mackey stated that she would be able to consider the guilt/innocence issues without any problem. Tr. Vol. 18 at 228-29. When asked if she could answer the special issues in a manner requiring the imposition of a death sentence, she stated "I still would have a hard time with it. I could vote like that, but I still would have a hard time within myself."

Tr. Vol. 18 at 229-30. Even so, she could not imagine a case in which she would be able to impose a death sentence, except that of Adolf Hitler. Tr. Vol. 18 at 230-31.

> The State again questioned Ms. Mackey and she clarified her position on serving as a juror:
>
> My religious belief is I don't believe in the death penalty. That was why I was asking if I could be excused from being in this jury or this case. I even stated on the paper—I remember on the back page that it stated: Would you want to be a juror in this case; I stated no.

Tr. Vol. 18 at 234. The trial court continued questioning Ms. Mackey. Ms. Mackey testified that she would be inclined to answer the special issues in such a way to ensure a life sentence, and would look at the evidence with that result in mind. Tr. Vol. 18 at 237.

The State moved to have Ms. Mackey excused for cause because of her inability to consider a death sentence. Tr. Vol. 18 at 238. Trial counsel opposed that motion. Tr. Vol. 18 at 238. The trial court then made the following findings:

> The Court makes specific findings in the standard set forth in Wainwright versus Witt in that I think Ms. Mackey is the classic vacillating juror.
>
> Based on her responses to the questionnaire, which she had validated in her oral responses to the Court, the Court finds that her strong feelings against capital punishment would prevent or substantially impair her performance as a juror in accordance with her oath and the Court's instructions, specifically her strong religious background which Mr. Vinson certainly established, her checking that she

> was opposed to capital punishment under any circumstances.
>
> * * *
>
> The Court finds Ms. Mackey should be excused for cause.

Tr. Vol. 18 at 238-239.

Medellin raised this claim on direct review. After reviewing the applicable law and the voir dire transcript, the Court of Criminal Appeals stated that "[g]iven the totality of the voir dire, we cannot say that the trial court abused its discretion in sustaining the State's challenge for cause to the veniremember." Opinion at 10. This Court reviews that decision under the AEDPA.

Exclusion of prospective jurors "hesitant in their ability to sentence a defendant to death" without any limitations violates the Fourth and Fourteenth amendments. *Morgan v. Illinois*, 504 U.S. 719, 732 (1992); see also *Adams v. Texas*, 448 U.S. 38, 45 (1980); *Witherspoon v. Illinois*, 391 U.S. 510, 521-22 (1968). The State must demonstrate through questioning that the potential juror it seeks to exclude lacks impartiality, and the judge must then determine whether the state's challenge is proper. *See Wainwright v. Witt*, 469 U.S. 412, 423 (1985). Thus, the key issue is "whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.' " *Id.* at 424 (quoting *Adams*, 448 U.S. at 45). "This standard . . . does not require that a juror's bias be proved with 'unmistakable clarity.' " *Wainwright*, 469 U.S. at 424. Thus, a reviewing court gives deference to a trial judge who could observe the demeanor of the potential juror. *Id.* at 424-26. This deference is consistent with AEDPA's presumption of correctness.

The exclusion of potential jurors is a question of fact. *See McCoy v. Lynaugh*, 874 F.2d 954, 960 (5th Cir. 1989); *Patton v. Yount*, 467 U.S. 1025, 1036 (1984). The factual determinations of the Texas Court of Criminal Appeals are presumed to be correct, and the petitioner has the burden of rebutting these determinations by clear and convincing evidence. *See* 28 U.S.C. § 2254(e)(1). This Court can grant federal habeas relief only if the state court decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2); *see also Fuller v. Johnson*, 114 F.3d 491, 500-01 (5th Cir.) (holding that a trial court's finding of juror bias is entitled to a presumption of correctness), *cert. denied*, 522 U.S. 963 (1997); *Granviel v. Lynaugh*, 881 F.2d 185, 187 (5th Cir. 1989) (stating that "[b]ecause of the difficulty of divining a prospective juror's state of mind, particularly on a cold record, we pay deference to the trial court's factual determination"), *cert. denied*, 495 U.S. 963 (1990).

The trial court found that Ms. Mackey exemplified the juror described in *Wainwright v. Witt*:

> What common sense should have realized experience has proved: many veniremen simply cannot be asked enough questions to reach the point where their bias has been made "unmistakably clear"; these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings. Despite this lack of clarity in the printed record, however, there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law.

469 U.S. at 424-25 (footnote omitted). The state court's characterization of Ms. Mackey as a vacillating juror is presumed correct because Medellin has not rebutted the finding with appropriate evidence. *See* 28 U.S.C. § 2254(e)(1). After reviewing the record, this Court is in agreement with Respondent's assertion that the state court's finding was reasonable in light of Ms. Mackey's responses. *See* 28 U.S.C. § 2254(d)(2). Because the trial court clearly could have been "left with the definite impression that [Ms. Mackey] would be unable to faithfully and impartially apply the law," *Witt*, 469 U.S. at 426, the trial court had a reasonable basis for granting the State's challenge for cause. In short, Medellin has failed to demonstrate that the state court disposition "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." *See* 28 U.S.C. § 2254 (d)(2). This claim is denied.

CERTIFICATE OF APPEALABILITY

Although Medellin has not yet requested a Certificate of Appealability ("COA"), the issue of a COA is likely to arise. This court may deny a COA *sua sponte*. *See Alexander v. Johnson*, 211 F.3d 895, 898 (5th Cir. 2000).[25] The Supreme Court has explained the standard for evaluating the issuance of a COA as follows:

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[25] The Supreme Court in *Miller-El v. Cockrell*, __ U.S. __, 123 S. Ct. 1029 (2003), recently reversed a case from the Fifth Circuit involving the COA standard. Prior to *Miller-El*, the Fifth Circuit resolved the question of COA in some cases by first determining whether a petitioner was entitled to relief and then denying COA because the appeal lacked merit. In *Miller-El*, the Supreme Court clarified a *circuit court*'s role in the COA process. The *Miller-El* Court found that a circuit court's COA analysis should not rest upon a "full consideration of the factual or legal bases adduced in support

> Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. The issue becomes somewhat more complicated where . . . the district court dismisses the petition based on procedural grounds. We hold as follows: When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.

Slack v. McDaniel, 529 U.S. 473, 484 (2000); *see also Miller-El*, __ U.S. at __, 123 S. Ct. at 1039-40.

The Court has carefully considered each of Medellin's claims. While the issues Medellin raises deserve

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of the claims." *Miller-El*, __ U.S. at __, 123 S. Ct. at 1039 (2003). Rather, "[t]he COA determination under § 2253(c) requires an overview of the claims in the habeas petition and a general assessment of their merits." *Id.* at __, 123 S. Ct. at 1039 (emphasis added). Thus, the Supreme Court held that "[w]hen a court of appeals side steps this process by first deciding the merits of an appeal, and then justifying the denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction." *Id.* at __, 123 S. Ct. at 1039. A district court's evaluation of the COA *sua sponte* does not raise the same jurisdictional concerns present in *Miller-El*. While *Miller-El* rejected the Fifth Circuit's review of the merits of a claim before that claim was properly before the circuit court, the same jurisdictional concern is not present when a district court evaluates a COA *sua sponte* before appeal. This Court clearly has jurisdiction to decide *sua sponte* whether a COA is warranted.

scrutiny, the Court finds that each of his claims is foreclosed by clear, binding precedent. Under the appropriate standards, this Court concludes that Medellin has failed to make a "substantial showing of the denial of a constitutional right" with respect to each issue raised in his petition. 28 U.S.C. § 2253(c)(2). This Court concludes that Medellin is not entitled to a COA on any of his claims.

CONCLUSION

Based on the foregoing, the Court concludes that Medellin is not entitled to federal habeas relief. As a result, it is hereby

ORDERED that Respondent's Motion for Summary Judgment (Docket Entry # 16) is Granted. It is further

ORDERED that Jose Ernesto Medellin's Petition for Writ of Habeas Corpus is **DENIED**, this case is **DISMISSED WITH PREJUDICE**, and a Certificate of Appealability will not issue.

The Clerk will provide copies of this Order to the parties.

SIGNED this 25th day of June, 2003.

JOHN D. RAINEY

John D. Rainey
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action No. H-01-4078

JOSE ERNESTO MEDELLIN,
Petitioner,

—v.—

JANIE COCKRELL,
Director, Texas Department of Criminal Justice,
Institutional Division,
Respondent.

FINAL JUDGMENT

For the reasons stated in the Court's Order denying habeas relief and granting summary judgment in favor of Respondent, it is **ORDERED** that this case be dismissed with prejudice. The Court **DENIES** a certificate of appealability.

THIS IS A FINAL JUDGMENT.

SIGNED this 25th day of June, 2003.

JOHN D. RAINEY
John D. Rainey
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Filed May 20, 2004
No. 03-20687

JOSE ERNESTO MEDELLIN,
Petitioner-Appellant,

—v.—

DOUG DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,
Respondent-Appellee.

Appeal from the United States District Court for the Southern District of Texas

Before
JONES, BENAVIDES, and CLEMENT,
Circuit Judges.

PER CURIAM:

Petitioner Jose Ernesto Medellin, a citizen of Mexico, was convicted of capital murder in Texas state court and sentenced to death. Medellin filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of Texas pursuant to 28 U.S.C. § 2254. The district court denied the petition. The district court also, *sua sponte*, denied Petitioner a certificate of appealability ("COA"). Petitioner now requests a COA from this Court pursuant to 28 U.S.C. § 2253(c)(2). For the following reasons, Petitioner's Application for a Certificate of Appealability from Denial of a Petition for Writ of Habeas Corpus is denied.

I. BACKGROUND

On June 24, 1993, Petitioner, along with fellow gang members, raped and killed two teenage girls whom the gang happened across after a gang initiation. Petitioner raped both girls and helped to murder at least one of the girls by holding one end of the shoelace used to strangle her.

After Petitioner was convicted of this crime and his sentence was imposed, the Texas Court of Criminal Appeals affirmed the conviction and sentence on direct appeal. Petitioner did not seek certiorari in the Supreme Court of the United States.

Petitioner subsequently filed a state application for a writ of habeas corpus. Without holding an evidentiary hearing on Petitioner's claims, the state trial-level habeas court recommended to the Texas Court of Criminal Appeals that Petitioner's application be denied. The Texas Court of Criminal Appeals agreed and denied Petitioner's application.

Petitioner filed a preliminary federal petition for a writ of habeas corpus in November 2001. Petitioner amended his petition in July 2002. As previously noted, the district court denied relief and also denied Petitioner a COA. Petitioner filed a timely notice of appeal. Petitioner now seeks a COA raising six claims, all of which were properly raised in the district court.

Petitioner alleges four grounds for relief based upon ineffective assistance of counsel. Petitioner alleges that his trial counsel was ineffective at the sentencing stage of his trial for failing to present evidence that Petitioner complied with his probation officer while on probation as a juvenile. Relatedly, Petitioner alleges that his trial counsel was ineffective at the sentencing phase of his trial for declining to inform the jury that Petitioner would have been eligible for parole after serving thirty-five years if he had been sentenced to life imprisonment. Petitioner also avers that his counsel on direct appeal was ineffective for failing to seek the enforcement of the state trial court's order purporting to preclude the state from seeking the death penalty. Finally, Petitioner claims that his appellate counsel was ineffective for not properly raising a *Batson* claim on direct appeal.

The remaining two grounds that Petitioner urges in support of his petition are that the state violated his rights as a foreign national to consular access under the Vienna Convention and that the state failed to disclose exculpatory information to defense counsel.

II. STANDARD FOR GRANTING A COA

Medellin filed his Section 2254 petition for a writ of habeas corpus after the effective date of the Antiterrorism and Effective Death Penalty Act ("AEDPA"). The petition, therefore, is subject to the procedures imposed by the AEDPA. *See Lindh v. Murphy*, 521 U.S. 320,336 (1997).

Under the AEDPA, a petitioner must obtain a COA before an appeal can be taken to this Court. *See* 28 U.S.C.A. § 2253(c)(2) (West 2003); *see also Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) ("[U]ntil a COA has been issued federal courts of appeals lack jurisdiction to rule on the merits of appeals from habeas petitioners."). "[W]hen a habeas applicant seeks permission to initiate appellate review of the dismissal of his petition, the court of appeals should limit its examination to a threshold inquiry into the underlying merit of his claims." *Miller-El*, 537 U.S. at 327. "This threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claims. In fact, the statute forbids it." *Id.* at 336.

A COA will be granted if the petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C.A. § 2253(c)(2) (West 2003). "A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El*, 537 U.S. at 327. "The question is the debatability of the underlying constitutional claim, not the resolution of that debate." *Id.* at 342. "Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." *Id.* at 338. Finally, "[b]ecause the present case involves the death penalty, any doubts as to whether a COA should issue must be resolved in [Petitioner's] favor." *Hernandez v. Johnson*, 213 F.3d 243, 248 (5th Cir. 2000).

We note that under the AEDPA, federal courts are to give a level of deference to state court findings per §§2254(d)(2) and (e)(1). At the COA stage, however, "we only ask whether the District Court's application of AEDPA deference, as stated in §§ 2254(d)(2) and (e)(1), to [a] claim was debatable amongst jurists of reason." *Miller-El*, 537 U.S. at 341.

III. ANALYSIS

a. Ineffective assistance of counsel

To prevail on a claim of ineffective assistance of counsel, Petitioner must show (1) that his counsel's performance was deficient, and (2) that the deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 689-94 (1984). "To establish deficient performance, a petitioner must demonstrate that counsel's representation 'fell below an objective standard of reasonableness.' " *Wiggins v. Smith*, 123 S.Ct. 2527, 2535 (2003) (quoting *Strickland*, 466 U.S. at 688). "[T]o establish prejudice, a 'defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' " *Id.* at 2542 (quoting *Strickland*, 466 U.S. at 692).

With the *Strickland* framework in mind, we turn to Petitioner's specific ineffective assistance claims.

1. Evidence that Petitioner complied with his probation as a juvenile

The jury found that Petitioner posed a future danger, one of the special findings required for imposition of a death sentence in Texas. Petitioner argues that his trial counsel was ineffective at the punishment stage of his trial for failing to investigate and present evidence of Petitioner's compliance with his probation officer while he was on probation as a juvenile. Petitioner necessarily alleges that this purported failure prejudiced him at the sentencing phase of his trial because the evidence would have shown that he did not pose a future danger.

The district court noted that Petitioner presented only hearsay evidence, in the form of an affidavit, that Petitioner's probation officer would testify that Petitioner satisfied his juvenile probation. Nonetheless, the district court addressed the merits of Petitioners claim and agreed with the state habeas court that Petitioner was not prejudiced even if his counsel was deficient. Because we find the district court's holding in this respect not debatable, even upon a threshold review, we may not issue a COA as to this claim.

Assuming that Petitioner's juvenile probation officer would have testified that Petitioner was a model probationer, Petitioner's own acts after he completed his juvenile probation belie a conclusion that he would not pose a threat of future dangerousness when in a supervised, structured environment. Putting aside the fact that Petitioner fell back into gang activity after completing his juvenile probation, ultimately leading to the horrific crime for which he was sentenced to death, Petitioner clearly indicated his continuing dangerousness while in prison awaiting trial. On two separate occasions while Petitioner was in the Harris County jail awaiting trial, Petitioner was found to have hidden shanks in his cell.

One cannot reasonably fathom how the fact that Petitioner once complied with probation as a juvenile rebuts the overwhelming evidence that Petitioner posed a future danger. Nothing that his probation officer may have said could have conceivably caused the jury to decide the question of Petitioner's future dangerousness in Petitioner's favor. Accordingly, it is not debatable that Petitioner was not prejudiced by his probation officer not testifying. Absent prejudice, Petitioner's claim fails the second *Strickland* prong. A COA may not issue as to this claim.

2. Evidence of Petitioner's eligibility for parole if he was not sentenced to death

Petitioner argues that his trial counsel was ineffective because counsel declined to inform the jury pool that, if sentenced to life imprisonment rather than death, Petitioner would be eligible for parole in thirty-five years. Though the trial court need not instruct the jury regarding a defendant's eligibility for parole, *see Tigner v. Cockrell*, 264 F.3d 521, 525 (5th Cir. 2001), the judge presiding over Petitioner's trial nonetheless indicated that she would allow Petitioner to inform the jury that, if sentenced to life, he would not be eligible for parole for thirty-five years.

In declining to inform the jury of Petitioner's eligibility for parole if sentenced to life imprisonment, Petitioner's trial counsel indicated that, based upon his past experience in death penalty trials and his own polling of juries, jurors thought life imprisonment meant no parole. He preferred to let the jury assume that Petitioner would not be eligible for parole.

In an attempt to show that his trial counsel's decision was objectively unreasonable, thereby meeting the first *Strickland* prong, Petitioner points to studies showing that members of the public underestimate the amount of time a convict will serve when sentenced to life imprisonment. Petitioner claims that when presented with the opportunity to inform the jury that Petitioner would not be eligible for parole before he had served thirty-five years of a life sentence, his trial counsel should have taken the opportunity.

"In a State in which parole is available, how the jury's knowledge of parole availability will affect the decision whether or not to impose the death penalty is speculative." *Simmons v. South Carolina*, 512 U.S. 154, 168 (1994). "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Strickland*, 466 U.S. at 690. "A decision regarding trial tactics cannot be the basis for a claim of ineffective assistance of counsel unless counsel's tactics are shown to be 'so ill chosen that it permeates the entire trial with obvious unfairness.' " *Teague v. Scott*, 60 F.3d 1167, 1172 (5th Cir. 1995) (quoting *Garland v. Maggio*, 717 F.2d 199, 206 (5th Cir. 1983)). Even if we were to review *de novo* the trial defense counsel's reasons for not informing the jury of Petitioner's potential eligibility for parole, we could not say the decision was objectively unreasonable. No reasonable jurist would debate that trial counsel's decision was so ill chosen that it permeated the entire trial, or even just the sentencing phase, with obvious unfairness.

Indeed, pointing out to the jury that Petitioner would be eligible for parole at age 53 could not conceivably have changed their determination that Petitioner posed a future danger. *See Woods v. Johnson*, 75 F.3d 1017, 1037 (5th Cir. 1996); *King v. Lynaugh*, 850 F.2d 1055, 1060 (5th Cir. 1988). Petitioner fails to meet either *Strickland* prong. Accordingly, the district court's application of AEDPA deference to the state habeas findings is not debatable. A COA may not issue as to this claim.

3. *Failure to raise on appeal the state trial court's alleged order precluding the death penalty*

Petitioner argues that his counsel on direct appeal was ineffective because counsel did not seek to enforce on appeal an order entered by the state trial court indicating that the state could not seek the death penalty. Petitioner made a motion prior to his trial to preclude the state from seeking the death penalty. In a pretrial conference, the state trial court indicated that it would deny Petitioner's motion. When the written order was issued, however, the judge signed on the line indicating that Petitioner's motion was granted. Of course, the trial continued and a death sentence was sought and obtained. Nothing was made of the order until Petitioner's state habeas proceedings.

At the state habeas proceedings, the state trial judge, the same judge who tried the case, indicated that she inadvertently signed the line granting Petitioner's motion to preclude the state from seeking the death penalty. The fact that the issuance of the written order was an inadvertence is self-evident. The trial judge, in fact, allowed the state to seek the death penalty. Petitioner offers nothing to contradict the pre-trial announcement by the district court that it would deny the motion and judge's personal recollection that she intended to deny his motion and that she inadvertently signed the wrong line.

Our Court decided a similar issue in *Riley v. Cockrell*, 339 F.3d 308 (5th Cir. 2003). At the state trial at issue in *Riley*, another Texas death penalty case, the defendant moved to dismiss the indictment against him. Despite verbally indicating that the court would deny the claim, the judge checked the space on the written order indicating that the motion was granted. The case went ahead to trial where the defendant was convicted and sentenced to death. The issue was raised during the state habeas proceedings before the same judge who had tried the case. The judge indicated that the order was entered inadvertently. The judge entered a *nunc pro tunc* order denying the petitioner's claim. Our Court ultimately held that the issuance of the *nunc pro tunc* order fixed any problem with the indictment and, therefore, held that it was not debatable whether petitioner could be granted relief on the claim *Riley*, 339 F.3d at 313-15.

Even if Petitioner's counsel on direct appeal had raised the issue, and if we assume the state appeals court would have found it sufficient to warrant remand for entry of a *nunc pro tunc* order, a proposition we strongly doubt, we have no doubt that Petitioner's death sentence would not have been vacated based upon this claim At best (from Petitioner's point-of-view), raising the issue on direct appeal would have led to the ultimate entry of a *nunc pro tunc* order retroactively denying Petitioner's motion. He would be in exactly the same position he is in now. Therefore, Petitioner was in no way prejudiced by his counsel's failure to raise this issue on direct appeal. No reasonable jurist would debate this point We may not, therefore, issue a COA as to this claim.

4. Failure to properly appeal the state's use of peremptory jury strikes

"Since [Petitioner's] claim rests on a *Batson* violation, resolution of his COA application requires a preliminary, though not definitive, consideration of the three-step framework mandated by *Batson* and reaffirmed in our later precedents." *Miller-El*, 537 U.S. at 340. "Under our *Batson* jurisprudence, once the opponent of a peremptory

challenge has made out a prima facie case of racial discrimination (step one), the burden of production shifts to the proponent of the strike to come forward with a race neutral explanation (step two). If a race-neutral explanation is tendered, the trial court must then decide (step three) whether the opponent of the strike has proved purposeful racial discrimination." *Purkett v. Elem*, 514 U.S. 765, 767 (1995). "In the context of the threshold examination in this *Batson* claim the issuance of a COA can be supported by any evidence demonstrating that, despite the neutral explanation of the prosecution, the peremptory strikes in the final analysis were race based. It goes without saying that this includes the facts and circumstances that were adduced in support of the prima facie case." *Miller-El*, 537 U.S. at 340.

On direct appeal, Petitioner claimed that the state violated *Batson* by striking two particular jurors. On federal habeas, this claim has been broadened to allege that the state's use of its peremptory strikes as a whole was discriminatory. As evidence that the prosecution purposefully discriminated against minority jury pool members, Petitioner notes that the state used six of its thirteen peremptory strikes to excuse African-American pool members. As evidence of the state's alleged discrimination based on sex, Petitioner notes that the state used eight of its thirteen peremptory strikes to exclude males from the jury. This is the only evidence Petitioner has ever offered in support of this claim.

We agree with the district court that it is not debatable that this is not sufficient to make even a *prima facie* case of racial or gender discrimination as to Petitioner's claim that the prosecution used its strikes in a discriminatory manner. Petitioner argues that these numbers present statistical evidence of discrimination. Petitioner, however, has not presented evidence of the racial and gender make-up of the entire jury pool. For the statistical evidence to be relevant, data concerning the entire jury pool is necessary. The number of strikes used to excuse minority and male jury pool members is irrelevant on its own. Indeed, depending on the make-up of the jury pool, such numbers could indicate that the state discriminated against Anglos and females. Moreover, the jury that was seated was diverse both with respect to race and gender. For this reason and those articulated by the district court, no reasonable jurist could disagree with the district court's application of the AEDPA deference to the state court's findings with respect to this part of Petitioner's claim.

As to the individual strikes Petitioner alleges were discriminatory, we hold that no reasonable jurist would disagree with the district court that the state's proffered race-neutral reasons were sufficient. "Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." *Purkett*, 514 U.S. at 768 (quoting *Hernandez v. New York*, 500 U.S. 352, 360 (1991) (plurality opinion)). Petitioner does not point to anything said by the prosecutor in the prosecutor's justification of the challenged strikes that even hints at an inherent discriminatory intent. We need not undertake an in-depth analysis to determine that the district court's deference to the state court findings was not remotely debatable.

Because the claim of discrimination in the prosecution's use of its peremptory strikes overall is without merit, the claim of ineffective assistance of counsel for not raising the issue on appeal is, likewise, without merit. To the extent Petitioner adheres to his pure *Batson* claim, that is, the claim raised on appeal and not allegedly indicating ineffective assistance of counsel, that claim is likewise meritless. Because no reasonable

jurists could debate the district court's resolution of this claim, we may not issue a COA as to this issue.

b. Vienna Convention violation

"The Vienna Convention is a 79-article, multilateral treaty negotiated in 1963 and ratified by the United States in 1969. Mexico is a signatory nation." *United States v. Jimenez-Nava*, 243 F.3d 192, 195 (5th Cir. 2001). Per Article 36, "the treaty requires an arresting government to notify a foreign national of his right to contact his consul." *Id.* at 195 n.2. The state concedes that Petitioner was not notified of his right to contact the Mexican consul.

Petitioner's claim fails for two reasons: 1) it is procedurally defaulted, and 2) even if it were not procedurally defaulted, the Vienna Convention, as interpreted by this Court in the past, does not confer an individually enforceable right.

1. Procedural default

The district court held that Petitioner's Vienna Convention claim was procedurally defaulted. Petitioner all but concedes that, under Texas law, he did procedurally default on his Vienna Convention claim by not raising the issue at the trial stage. *See Fisher v. Texas*, 169 F.3d 295, 300-01 (5th Cir. 1999). Petitioner argues, however, that the state's application of the procedural default rule in this case violates the Vienna Convention. To support this conclusion, Petitioner relies on the *LaGrand Case* (*Germany v. United States of America*), 2001 ICJ 104 (Judgment of June 27) ("*LaGrand*")). In *LaGrand*, the International Court of Justice held that procedural default rules cannot bar review of a petitioner's claim. *LeGrand* at ¶¶ 90-91. We note that the International

Court of Justice adhered to this position again in *Avena and Other Mexican Nationals (Mexico v. United States of America)*, a case brought by Mexico on behalf of Petitioner and others. *See* 2004 ICJ 128 (Judgment of March 31) ("*Avena*") at ¶¶ 110-13, 153. The Supreme Court, prior to the *Avena* and *LaGrand* decisions, however, ruled that Vienna Convention claims, like Constitutional claims, can be procedurally defaulted, even in a death penalty case. *Breard v. Greene*, 523 U.S. 371, 375 (1998). Though *Avena* and *LaGrand* were decided after *Breard*, and contradict *Breard*, we may not disregard the Supreme Court's clear holding that ordinary procedural default rules can bar Vienna Convention claims. "If a precedent of [the Supreme Court] has direct application in a case [...], the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/American Express*, 490 U.S. 477, 484 (1989). That is, only the Supreme Court may overrule a Supreme Court decision. The Supreme Court has not overruled *Breard*. We are bound to follow the precedent until taught otherwise by the Supreme Court.

2. *No individually enforceable right under Article 36 of the Vienna Convention*

Even if Petitioner were not procedurally barred from making his Vienna Convention claim, the case law of our Court precludes success on this claim. In making his Vienna Convention claim, Petitioner necessarily also argues that Article 36 creates an individually enforceable right. For this proposition, Petitioner again relies on *LaGrand*. The International Court of Justice held in *LaGrand* that Article 36 did create personal rights. *LaGrand* at ¶ 177. Again, we note that the International Court of Justice adhered to this position in *Avena*. *See Avena* at 140.

A prior panel of this Court, however, held that Article 36 of the Vienna Convention does not create an individually enforceable right. *Jimenez-Nava*, 243 F.3d at 198 ("The sum of [petitioner's] arguments fails to lead to an ineluctable conclusion that Article 36 creates judicially enforceable rights of consultation between a detained foreign national and his consular office. Thus, the presumption against such rights ought to be conclusive."). Despite minor differences in this case and that presented in *Jimenez-Nava*, the Court's holding in *Jimenez Nava* is inescapable. We are bound to apply this holding, the subsequent decision in *LaGrand* notwithstanding, until either the Court sitting *en banc* or the Supreme Court say otherwise. "[N]o panel is empowered to hold that a prior decision applies only on the limited facts set forth in that opinion." *United States v. Smith*, 354 F.3d 390, 399 (5th Cir. 2003). Accordingly, we deny a COA on this issue.

c. The state's alleged failure to disclose exculpatory information to defense counsel

"*Brady*, we reiterate, held that 'the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.' " *Banks v. Dretke*, 124 S. Ct. 1256, 1272 (2004) (citing *Brady v. Maryland*, 373 U.S. 83, 87 (1963)). In *Strickler v. Greene*, the Supreme Court framed "the three components or essential elements of a *Brady* prosecutorial misconduct claim: 'The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.' " *Banks*, 124 S. Ct. at 1272 (quoting *Strickler v. Green*, 527 U.S. 263, 281-82 (1999)).

Petitioner's first *Brady* claim is that the government suppressed information about a promise to dismiss a misdemeanor charge against Joe Cantu in exchange for his testimony and the testimony of his wife Christina Cantu against Petitioner. Their testimony helped to establish the precise role Petitioner played in the rapes and murders. The only concrete evidence presented by Medellin to support this claim, however, is an affidavit from Christina Cantu, stating that (1) an employee in the prosecutor's helped Joe Cantu obtain a lawyer, and (2) the charges against Joe Cantu were later dropped by the state. These two facts, even if true, do not by themselves show that any type of agreement existed. Rather, Petitioner's claim rests upon a substantial degree of speculation. An applicant's speculation about the suppression of exculpatory evidence is an insufficient basis to support a *Brady* claim. *Hughes v. Johnson*, 191 F.3d 607, 630 (5th Cir. 1999).

Petitioner next argues that the government failed to disclose that Joe Cantu was arrested for a misdemeanor. Petitioner's counsel, however, agreed during a pre-trial hearing that the government need only release the felony arrest records of its witnesses. Because Petitioner essentially waived his access to Joe Cantu's misdemeanor arrest record, he may not now claim that such evidence was suppressed by the government.

Even if Petitioner could establish that the government suppressed Joe Cantu's misdemeanor arrest, or that the government suppressed a deal to drop the charges against Joe Cantu, Petitioner nonetheless fails to show that this information is material in light of the overwhelming evidence establishing his guilt. The district court correctly emphasized that "substantial and convincing evidence" of Petitioner's role in the murders existed even without the Cantus' testimony (*i.e.*, Medellin confessed to the rape and murder, he was placed by another witness at the scene of the murder, and he gave the victims' jewelry to his girlfriend).

IV. CONCLUSION

Petitioner has not shown that reasonable jurists could disagree with the district court's denial of any of his claims. Accordingly, we deny Petitioner's Application for a Certificate of Appealability from Denial of a Petition for Writ of Habeas Corpus.

DENIED.

Constitutional, Treaty, and Statutory Provisions Involved

Constitution of the United States of America

Art. II, § 2, cl. 2. Treaties—Appointment of Officers

He [the President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

Art. III, § 2, cl. 1. Subjects of Jurisdiction

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Art. VI, cl. 2. Supreme Law

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Vienna Convention on Consular Relations, *opened for signature* Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261.

Article 36. Communication and Contact With Nationals of the Sending State

1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:

(a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;

(b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph;

(c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.

(2) The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended.

Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, *opened for signature* Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 487.

Art. I.

Disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol.

U.N. Charter, *opened for signature* Jun. 26, 1945, 59 Stat. 1031, T.S. 993.

Articles 92-96, International Court of Justice

Art. 92.

The International Court of Justice shall be the principal judicial organ of the United Nations. It shall function in accordance with the annexed Statute, which is based upon the Statute of the Permanent Court of International Justice and forms an integral part of the present Charter.

. . . .

Art. 93(1).

All Members of the United Nations are *ipso facto* parties to the Statute of the International Court of Justice.

. . . .

Art. 94(1).

Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party.

Statute of the International Court of Justice, 59 Stat. 1055.

Art. 1.

The International Court of Justice established by the Charter of the United Nations as the principal judicial organ of the United Nations shall be constituted and shall function in accordance with the provisions of the present Statute.

Chapter I: Organization of the Court

. . . .

Art. 3(1)

The Court shall consist of fifteen members, no two of whom may be nationals of the same state.

Art. 9

At every election, the electors shall bear in mind not only that the persons to be elected should individually possess the qualifications required, but also that in the body as a whole the representation of the main forms of civilization and of the principal legal systems of the world should be assured.

Art. 31(2)

If the Court includes upon the Bench a judge of the nationality of one of the parties, any other party may choose a person to sit as judge. Such person shall be chosen preferably from among those persons who have been nominated as candidates as provided in Articles 4 and 5.

Chapter II: Competence of the Court

. . . .

Art. 36(1)

The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.

Chapter III: Jurisdiction

. . . .

Art. 59

The decision of the Court has no binding force except between the parties and in respect of that particular case.

Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, T.S. No. 58, 1155 U.N.T.S. 331.

Art. 27. Internal law and observance of treaties.

A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46.

IN THE COURT OF CRIMINAL APPEALS OF
THE STATE OF OKLAHOMA

FILED May 13, 2004
Case No. PCD-04-442

OSBALDO TORRES,

Appellant,

—v.—

THE STATE OF OKLAHOMA,

Appellee.

ORDER GRANTING STAY OF EXECUTION AND REMANDING CASE FOR EVIDENTIARY HEARING

Osbaldo Torres was tried by jury, convicted of first degree murder and other charges, and received the death penalty in the Oklahoma County District Court, Case No. CF-1993-4302. This Court affirmed Torres's conviction for murder, and the United States Supreme Court denied Torres's petition for certiorari.[1] This Court denied Torres's first Application for Post-Conviction Relief on August 4, 1998.[2] Torres's application for federal habeas relief was denied.[3] This Court subsequently denied Torres's second Application for Post-Conviction Relief.[4] Torres's execution date is set for Tuesday, May 18, 2004. On April 29, 2004, Torres filed a Subsequent Application for Post-Conviction Relief. The State filed a Response on May 11, 2004. Briefs were also filed on behalf of *amici curiae* the Government of the Republic of Mexico and international law experts and former diplomats.

After consideration of the pleadings filed with this Court, we order that Torres's execution date be **STAYED** indefinitely, pending further order of this Court.

We further order that Torres's request for an evidentiary hearing is **GRANTED**.[5] This case is **REMANDED** to the District Court of Oklahoma County for an evidentiary hearing on the issues of: (a) whether Torres was prejudiced by the State's violation of his Vienna Convention rights in failing to inform Torres, after he was detained, that he had the right to contact the Mexican consulate; and (b) ineffective assistance of counsel.

The evidentiary hearing shall be held within sixty (60) days from the date of this Order. The trial court shall file findings of fact and conclusions of law with this Court within forty-five (45) days of the conclusion of the evidentiary hearing, together with the transcripts and record of the proceedings. Torres shall file a supplemental brief addressing the trial court's findings of fact and conclusions of law within twenty (20) days after the District Court's findings and conclusions are filed with this Court. The State shall file a response brief within fifteen (15) days after Torres's supplemental brief is filed.

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[1] *Torres v. State*, 1998 OK CR 40, 962 P.2d 3, *cert. denied*, 525 U.S. 1082, 119 S.Ct. 826, 142 L.Ed. 2d 683 (1999)

[2] *Torres v. State*, Case No. PCD-1998-213 (Okl. Cr. August 4, 1998) (Order not for publication).

[3] *Torres v. Mullen*, 317 F.3d 1145 (10th Cir. 2003), *cert. denied*, 540 ___ U.S. ___, 124 S.Ct. 562, 919, 157 L.Ed.2d 454 (2003).

[4] *Torres v. State*, 2002 OK CR 35, 58 P.3d 214, *cert. denied*, 538 ___ U.S. ___, 928, 123 S.Ct. 1580, 155 L.Ed.2d 323 (2003).

[5] 22 O.S. 2001, §1089(D)(5); Rule 9.7(D)(4)-(7), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2004).

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 13 day of May, 2004.

CHARLES A. JOHNSON
CHARLES A. JOHNSON, Presiding Judge

STEVE LILE [ILLEGIBLE COPY]
STEVE LILE, Vice Presiding Judge

GARY L. LUMPKIN [ILLEGIBLE COPY]
GARY L. LUMPKIN, Judge

CHARLES S. CHAPEL [ILLEGIBLE COPY]
CHARLES S. CHAPEL, Judge

RETA M. STRUBHAR
RETA M. STRUBHAR, Judge

ATTEST:

MICHAEL S. RICHIE
Clerk

CHAPEL, J., SPECIALLY CONCURRING:

I specially concur in this decision staying Torres's execution and remanding the case for an evidentiary hearing. I write to comment on the dissent's conclusion that the International Court of Justice decision here is not binding, and on dissent's statement that, under that case's terms, all this Court need do is to review Torres's case to see whether his trial and conviction afforded him minimal due process.

This case presents an issue of first impression for this Court, and for any other court within the United States. Torres bases his subsequent application for relief on the International Court of Justice decision, *Case Concerning Avena and other Mexican Nationals (Mexico v. United States of America)* [Avena].[1] That case was brought by the Government of Mexico against the United States of America to resolve a diplomatic dispute over alleged violations of the Vienna Convention on Consular Relations [Vienna Convention][2] in the United States criminal cases of fifty-two Mexican nationals, including Torres. In *Avena,* the International Court of Justice found that Torres's rights under the Vienna Convention were violated, and ordered the United States to review and reconsider Torres's conviction and sentence in light of the treaty breach. This Court must determine how to apply that ruling.

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[1] 2004 I.C.J. 128 (Judgment of March 31, 2004). The existence of this specific judgment in Torres's case distinguishes this situation from the one this Court faced in *Valdez v. State,* 2002 OK CR 20, 46 P.3d 703. In *Valdez,* the petitioner attempted to rely on an International Court of Justice case to which neither he nor his complaining government were party, and which did not specifically discuss his Vienna Convention claims.

[2] Multilateral Vienna Convention on Consular Relations and Optional Protocol on Disputes. 21 U.S.T. 77 (1969), T.I.A.S. No. 6820.

The Vienna Convention is a multinational treaty respecting consular relations, which provides that law enforcement authorities shall inform detained foreign nationals of their right to contact consular officials for assistance.[3] Both the United States and Mexico are signatories to the Convention.[4] The Convention itself does not specify an enforcement mechanism. That mechanism is contained in the Optional Protocol, ratified along with the Convention itself, which provides that states may bring disputes under the Vienna Convention to the International Court of Justice for binding resolution. Under the treaty's terms, while states ratifying the Vienna Convention are free to accept or reject the Optional Protocol, acceptance creates a binding obligation. The United States proposed this provision on dispute settlement and was instrumental in drafting the Optional Protocol,[5] was the first state to bring a case under its provisions,[6] and has consistently looked to the International Court of Justice for binding decisions in international treaty disputes, including those brought under the Vienna Convention.[7]

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[3] Vienna Convention, 21 U.S.T. 77, art 35, ¶ 1.

[4] The United States Senate ratified the treaty and optional protocol on October 12, 1969, and President Richard Nixon ratified it on November 12, 1969. It was entered into force with respect to the United States on December 24, 1969, and President Nixon proclaimed the treaty's entry into force on January 29, 1970. 115 Cong. Rec. 30997 (Oct. 22, 1969); 21 U.S.T. 77, 373.

[5] Report of the United States Delegation to the Vienna Conference on Consular Relations, reprinted in Sen. Exec. E. 91st Cong., 1st Sess., May 8, 1969, at 41-59-61.

[6] *United States Diplomatic and Consular Staff in Tehran (United States v. Iran)*, 1979 I.C.J. 7; 1980 I.C.J. 3, 5, 24-26.

[7] "Under the fundamental principle of *pacta sunt servanda*, which states that 'treaties must be observed,' the United States has consistently invoked the Vienna Convention to protest other nations' failures to provide Americans with access to consular officials." *U.S. v. Superville*, 40 F.Supp.2d 672, 676 (D. Virgin Islands, 1999).

The United States was the first to bring a case in the International Court of Justice specifically under the Optional Protocol.[8] The United States has also defended against eleven cases brought in the International Court of Justice, including *Avena*.[9]

There is no question that this Court is bound by the Vienna Convention and Optional Protocol. The Supremacy

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[8] *Tehran Hostages, supra* Note 13; *Treatment in Hungary of Aircraft and Crew of the United States of America (United States v. Hungary)*, 1954 I.C.J. 99, 103 (Vienna convention claim dismissed because Hungary had not consented to International Court of Justice jurisdiction). *See also Case Concerning Elettronica Sicula S.p.A.* (ELST) (*U.S. v. Italy*) 1989 I.C.J. 15 (1948 Treaty of Friendship, Commerce and Navigation between Italy and United States, the Protocol and 1951 Supplementary Agreement); *Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area* (*Canada/United States of America*), 1984 I.C.J. 246 (1958 Convention on the Continental Shelf); *Aerial Incident of 7 November 1954 (United States v. USSR)* (1959); *Aerial Incident of 4 September 1954 (United States v. USSR)* (1958); *Aerial Incident of 27 July 1955 (United States v. Bulgaria)* (1957-1960); *Aerial Incident of 7 October 1952 (United States v. USSR)* (1955-1956); *Aerial Incident of 10 March 1953 (United States v. Czechoslovakia)* (1955-1956); *Treatment in Hungary of Aircraft and Crew of the United States of America (United States v. Hungary)* (1954); *Treatment in Hungary of Aircraft and Crew of the United States of America (United States v. USSR)* (1954).

[9] *See Case Concerning the Vienna Convention on Consular Relations* (*Paraguay v. United States*) 1998 I.C.J. 426, and the *LaGrand Case* (*F.R.G. v. United States*) 2001 I.C.J. 104, all brought under the Vienna Convention. The *Paraguay* case was dismissed at Paraguay's request after Virginia executed its subject, defendant Angel Francisco Breard. *LaGrand* found that Germany's and Walter LaGrand's rights under the Vienna Convention were violated when Arizona failed to inform LaGrand of his right to contact the German consulate; LaGrand was also executed during the pendency of International Court of Justice proceedings.

Clause provides that "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land."[10] The federal government's power to make treaties is independent of and superior to the power of the states.[11] Every state or federal court considering the Vienna Convention, for any reason, has agreed that is binding on all jurisdictions within the United States, individual states, districts and territories. Several courts have expressed concern that any failure of United States courts to abide by the Vienna Convention may have significant adverse consequences for United States citizens abroad. "Treaty violations not only undermine the "Law of the Land," but also international law, where reciprocity is key. If American law enforcement officials disregard, or perhaps more accurately, remain unaware of the notification provision in Article 36, then officials of foreign signatories are likely to flout those obligations when they detain American citizens."[12] I share those concerns.

At its simplest, this is a matter of contract. A treaty is a contract between sovereigns.[13] The notion that contracts must be enforceable against those who enter into them is fundamental to the Rule of Law. This case is resolved by that very basic idea. The United States voluntarily and legally entered into a treaty, a contract with over 100 other countries. The United States is bound by the terms of the treaty and the State of Oklahoma is obligated by virtue of the Supremacy Clause to give effect to the treaty.

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[10] U.S. Const. Art. VI cl. 2. *See, e.g., Antoine v. Washington,* 420 U.S. 194, 201, 95 S.Ct. 944, 949, 43 L.Ed.2d 129 (1975) (treaties are binding upon affected states under the Supremacy Clause); *Mezquita v. State,* 125 S.W.3d 161, 169 (Ark., 2003); *State v. Prasertphong,* 75 P. 3d 675, 688 (Ariz., 2003); *Garcia v. State,* 17 P.3d 994 (Nev., 2001); *State v. Issa,* 752 N.E.2d 904, 915 n.2 (Ohio, 2001); *State v. Miranda,* 622 N.W.2d 353, 355 (Minn. App., 2001); *U.S. v. Carrillo,* 70 F.Supp.2d 854, 859 (N.D.Ill., 1999); *U.S. v. Emuegbunum,* 268 F.3d 377, 389 (C.A.6 2001); *U.S. v. Jimenez-Nava,* 243 F.3d 192, 195 (C.A.5 2001); *U.S. v. Li,* 206 F.3d 56, 60 (C.A.1, 2000). *See also Busby v. State,* 40 P.3d 807, 8098 n.2 (Alaska App., 2002) (Convention on Road Traffic).

[11] *See, e.g., Nielsen v. Johnson,* 279 U.S. 47, 52, 49 S.Ct. 223, 224, 73 L.Ed. 607 (1929), *U.S. v. Emuegbunam,* 268 F.3d 377 (C.A.6 2001); *U.S. v. Jimenez-Nava,* 243 F.3d 192, 195 (C.A.5 2001); *Murphy v. Netherland,* 116 F.3d 97, 100 (C.A. 4 1997); *Busby v. State,* 40 P.3d 807, 809 (Alaska App., 2002).

[12] *U.S. v. Carrillo,* 70 F.Supp.2d 854, 860 (N.D.Ill. 1999). "Accordingly, the State Department has intervened and attempted to persuade state authorities to honor the Vienna Convention when state law enforcement officers have neglected or refused to inform detained foreign nationals of their right to contact consular officials. For example, the Secretary of State recently asked the Governor of Virginia to stay the execution of Paraguayan death-row prisoner Angel Francisco Breard until the International Court of Justice could consider whether Virginia's violation of the Vienna Convention warranted a new trial. The Secretary expressed concern that "[t]he execution . . . could lead some countries to contend incorrectly that the U.S. does not take seriously its obligations under the Convention." [FN4] As the Secretary recognized, continued violation of the treaty imperils the rule of law, the stability of consular relations, and the safety of Americans detained abroad." *U.S. v. Superville,* 40 F.Supp.2d 672, 676 (D. Virgin Islands, 1999); "The United States, through this treaty [the Vienna Convention], has clearly granted certain specified rights to foreign nationals. The purpose behind those rights is two-fold: i) to afford minimal protections to foreign nationals detained by authorities in this country and ii) to assure minimal protections to United States (U.S.) citizens detained by authorities in foreign countries who are also signatories to the Treaty. In my judgment, the decision of this Court in this case, and the decision of the United States Supreme Court puts U.S. citizens traveling abroad at risk of being detained without notice to U.S. consular officials. Why should Mexico, or any other signatory country, honor the Treaty if the U.S. will not enforce it? The next time we see a 60 Minutes piece on a U.S. citizen locked up in a Mexican jail without notice to any U.S. governmental official we ought to remember these cases." *Flores v. State,* 1999 OK CR 52, 994 P.2d 782, 788 (Chapel, J., concurring in result).

[13] *United States v. Stuart,* 489 U.S. 353, 365-66, 109 S.Ct. 1183, 1190-91, 103 L.Ed.2d 388 (1989); *Roeder v. Islamic Republic of Iran,* 333 F.3d 228, 238 (C.A.D.C., 2003); *In re Commissioner's Subpoenas,* 325 F.3d 1287, 1301 (C.A.11 2003); *U.S. v. Emuegbunam,*

As this Court is bound by the treaty itself, we are bound to give full faith and credit to the *Avena* decision. I am not suggesting that the International Court of Justice has jurisdiction over this Court—far from it. However, in these unusual circumstances the issue of whether this Court must abide by that court's opinion in Torres's case is not ours to determine. The United States Senate and the President have made that decision for us. The Optional Protocol, an integral part of the treaty, provides that the International Court of Justice is the forum for resolution of disputes under the Vienna Convention.[14]

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268 F.3d 377, 389 (C.A.6, 2001); *U.S. v. Jimenez-Nava*, 243 F.3d 192, 195 (C.A.5 2001); *U.S. v. Li*, 206 F.3d 56, 60 (C.A.1, 2000); *Tabion v. Mufti*, 73 F.3d 535, 537 (C.A.4 1996).

[14] "The States Parties to the present Protocol and to the Vienna Convention on Consular Relations, hereinafter referred to as 'the Convention', adopted by the United Nations Conference held at Vienna from 4 March to 22 April 1963, Expressing their wish to resort in all matters concerning them in respect of any dispute arising out of the interpretation or application of the Convention to the compulsory jurisdiction of the International Court of Justice, unless some other form of settlement has been agreed upon by parties within a reasonable period, Have agreed as follows: Article I. Disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol." 21 U.S.T. 77, 325-29.

The negotiation and administration of treaties is reserved to the Executive Branch, with Senate ratification.[15] Therefore, when interpreting a treaty, we give great weight to the opinion and practice of the government department primarily responsible for it.[16] The State Department has consistently taken the position that the only remedies under the Vienna Convention are diplomatic, political, or exist between states under international law.[17] As noted above, the State Department has also consistently turned to the International Court of Justice to provide a binding resolution of disputes under the Vienna Convention, and has relied on the binding nature of International Court of Justice decisions to enforce United States rights under the Convention. The *Avena* decision mandates a remedy for a particular violation of Torres's, and Mexico's rights under the Vienna Convention.[18] *Avena* is the product of the process set forth in the Optional Protocol, under which Mexico brought a suit against the United States for alleged treaty violations. This process is promulgated by the treaty itself and exists between states as a result of international law—well within the State Department's definition of an appropriate remedy for violations of the Vienna Convention.

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[15] U.S. Const., art. II §2 cl. 2.

[16] *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 168, 119 S.Ct. 662, 671, 142 L.Ed.2d 576 (1999); *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 185, 102 S.Ct. 2374, 72 L.Ed.2d 765 (1982); *U.S. v. Duarte-Acero*, 296 F.3d 1277, 1282 (C.A.11 2002); *Emuegbunam*, 268 F.3d at 392; *United States v. De La Pava*, 268 F.3d 157, 165 (2nd Cir.2001); *Li*, 206 F.3d at 63.

[17] In a First Circuit case, the State Department submitted answers to questions posed by the Court regarding its interpretation of the Vienna Convention. The Court subsequently cited that response: "[In] Department of State Answers to the Questions Posed by the First Circuit in United States v. Nai Fook Li ('Answers') at A-2, the State Department has concluded that [t]he [Vienna Convention] and the US-China bilateral consular convention are treaties that establish state-to-state rights and obligations. . . . They are not treaties establishing rights of individuals. The right of an individual to communicate with his consular official is derivative of the sending state's right to extend consular protection to its nationals when consular relations exist between the states concerned. Id. at A-3; see also id. at A-1. "The [only] remedies for failures of consular notification under the [Vienna Convention] are diplomatic, political, or exist between states under international law." See id. at A-3." *Li*, 206 F.3d at 63. These Answers have been subsequently cited in a number of state and federal cases. *See, e.g., State v. Navarro*, 659 N.W.2d 487, 491, (Wis.App., 2003) *Review Denied by State v. Navarro*, 661 N.W.2d 101, (Wis. 2003) (TABLE, NO. 02-0850-CR); *U.S. v. Duarte-Acero*, 296 F.3d 1277, 1282 (C.A.11 2002); *State v. Martinez-Rodriguez*, 33 P.3d 267, 272 n. 5 (N.M., 2001); *U.S. v. Carrillo*, 70 F. Supp.2d 854,

Having determined that this Court is bound by the treaty and the *Avena* decision, I turn to the decision itself. The International Court of Justice found that Torres's, and Mexico's, rights under the Vienna Convention were violated when he was not informed of his right to contact his consulate for aid after his Oklahoma arrest for murder. I note that neither the State of Oklahoma nor the United States has ever disputed (a) that Torres is a Mexican national, or (b) that he was not informed of his rights under the Vienna Convention. At the time of his arrest, Torres was registered as a resident alien with the Immigration and Naturalization Service.[19] As a remedy for this violation, *Avena* directs the United States to review and reconsider Torres's conviction and sentence in light of the consequences of the treaty violation.[20] That review and reconsideration falls to this court. This is the first state pleading in which Torres has raised his Vienna Convention claim, and normally this Court would consider it procedurally barred. However, while leaving the particular method of review and reconsideration up to the United States, *Avena* states that a complete application of procedural bar will not fulfill the mandate to review and reconsider the conviction, if procedural bar prevents the Vienna Convention claim from being heard.[21] In order to give full effect to *Avena*, we are bound by its holding to review Torres's conviction and sentence in light of the Vienna Convention violation, without recourse to procedural bar. Common sense and

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860 (N.D. Ill., 1999); *U.S. v. Superville*, 40 F.Supp.2d 672, 676 (D. Virgin Islands, 1999).

[18] This essential aspect of the case distinguishes it from *Committee of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 937-938 (D.C. Cir. 1988). The plaintiffs in *Nicaragua* attempted to invoke an International Court of Justice decision made under international law and a treaty with Nicaragua. However, the plaintiffs were not parties to the International Court of Justice decision, and the treaties relied on were not self-executing. By contrast, *Avena* applies directly to Torres's case, and the Vienna Convention is self-executing through the Optional Protocol.

[19] Exhibits Q, S, Appendix, Subsequent Application for Post-Conviction Relief. As the dissent notes, the State claims that there is conflicting information regarding when Mexico was first told of Torres's detention. However, any such conflict does not change the fact that Torres was never personally informed of his right to contact the consulate, as required under the treaty.

[20] *Avena*, slip op. at 52.

[21] *Avena* slip op. at 51-52. This holding distinguishes this case from cases in which Vienna Convention claims were brought to United States state and federal courts in the first instance. Courts, including this court, have routinely applied procedural bar to such claims. *See, e.g., Valdez v. State*, 2002 OK CR 20, 46 P.3d 703, 709; *Breard v. Greene*, 523 U.S. 371, 375, 118 S.Ct. 1352, 1354, 140 L.Ed.2d 529 (1998). *Murphy v. Netherland*, 116 F.3d 97, 100 (C.A.4, 1997); *Mezquita v. State*, 125 S.W.3d 161 (Ark., 2003); *Ademodi v. State*, 616 N.W.2d 716, 717 n.2 (Minn., 2000); *State v. Reyes-Camarena*, 7 P.3d 522 (2000); *State v. Ameen*, 183-84, 1 P.3d 330 (Kan. App. 2000).

fairness also suggest this result. Torres, like many foreign nationals, was unaware he had the right to contact his consulate after his arrest for murder.[22] Torres's Vienna Convention claim was generated by the State of Oklahoma's initial failure to comply with a treaty. I believe we cannot fulfill the goal of a fair and just review of Torres's case if we refuse to look at his Vienna Convention claims on the merits.

Torres argues that the violation of his Vienna Convention rights deprived him of the substantial investigative, legal, and financial assistance which would have been, and eventually was, afforded him by the Mexican government. He claims that the information developed with this assistance would, if presented to a jury, have resulted in a different outcome. He also claims that trial counsel was ineffective for failing to inform him of his right to consular assistance under the Vienna Convention and was rendered ineffective by counsel's lack of experience and funds, which could have been remedied had the Mexican government been notified of his detention and the charges against him.

In determining the merits of these claims, I first look to see whether Torres has shown prejudice. In dicta, the United States Supreme Court has noted that any claim of error under the Vienna Convention is subject to a requirement of prejudice.[23] Other courts, considering

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[22] In an earlier opinion in Torres's case, Justice Stevens noted it was "manifestly unfair" to apply procedural bar to "a foreign national who is presumptively ignorant of his right to notification." *Torres v. Mullin*, ___ U.S. ___, 124 S. Ct. 919, 919, 157 L.Ed.2d 454 (2003) (Stevens, J., dissenting to denial of petition for writ of certiorari).

[23] *Breard v. Greene*, 523 U.S. 371, 377, 118 S.Ct. 1352, 1356, 140 L.Ed.2d 529 (1998) (refusing to stay Breard's execution during pendency of International Court of Justice case, case was decided on procedural bar grounds).

Vienna Convention claims brought initially in state and federal courts, have used a three-prong test to determine prejudice: (1) the defendant did not know he had a right to contact his consulate for assistance; (2) he would have availed himself of the right had he known of it; and (3) it was likely that the consulate would have assisted the defendant.[24] I would adopt this test. The first of these prongs is uncontested. Regarding the second prong, Torres had provided this Court with an affidavit stating that he would have asked the Mexican consulate for help.[25] This assertion is bolstered by the fact that Torres did request help from the Mexican government when he became aware of his right to do so, after his direct appeal had been filed.[26]

Torres offers this Court a great deal of material regarding the third prong. The Mexican government has actively assisted Mexican nationals since well before Torres's 1993 arrest. This tradition of active assistance extends back to the 1920s.[27] In 1993, the Mexican government monitored and participated in capital cases throughout the United States involving Mexican nationals through consulates, Mexican government departments, and retained counsel in the United States.[28] Mexico has a systematic procedure to offer very specific consular assistance in defending these cases.[29] Consular officials monitor defense counsel's efforts, speak regularly with defense counsel, the defendant and his family, and attend court proceedings; officials often assist in gathering evidence in preparation for both stages of capital trials.[30] Mexico provides funds for experts and investigators, particularly regarding discovery and presentation of mitigating evidence, but for DNA testing, jury consultants, and other specialized testimony where appropriate.[31] Mexico obtains and provides official documents from institutions in Mexico such as schools and hospitals, searches for criminal records, and assists attorneys traveling in Mexico with logistical support, translators, and witness identification and preparation.[32]

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[24] *People v. Preciado-Flores*, 66 P.3d 155, 161 (Colo. App., 2002); *Zavala v. State*, 739 N.E.2d 135, 142 (Ind. App., 2000); *State v. Cevallos-Bermeo*, 754 A.2d 1224, 1227 (N.J. Super.A.D., 2000); *U.S. v. Chaparro-Alcantara*, 37 F.Supp.2d 1122, 1126 (N.D.Ill. 1999); *United States v. Esparza-Ponce*, 7 F.Supp.2d 1084 (S.D.Cal. 1998); *United States v. Villa-Fabeia*, 883 F.2d 434, 440 (9th Cir. 1989), *overruled on other grounds*, *United States v. Proa-Tovar*, 975 F.2d 952 (9th Cir. 1992).

[25] Affidavit of Osvaldo Torres Aguilera, Exhibit W, Appendix, Subsequent Application for Post-Conviction Relief (Appendix).

[26] Torres's family contacted the Mexican Consulate in 1997. Affidavit of Arturo A. Dager Gomez, ¶¶ 29-31, Exhibit A, Appendix.

[27] Affidavit of Everard Kidder Meade IV, Exhibit G, Appendix.

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[28] Affidavit of Arturo A. Dager Gomez, Exhibit A, Appendix; Affidavit of Ramon Xilotl Ramirez, Exhibit B, Appendix; Affidavit of Scott J. Atlas, Exhibit C, Appendix; Affidavit of Barbara K. Strickland, Exhibit D, Appendix; Affidavit of Jaime Paz Y Puente Gutierrez, Exhibit E, Appendix; Affidavit of Bonnie Lee Goldstein, Exhibit F, Appendix; Declaration of Michael Iaria, Exhibit H, Appendix.

[29] Affidavit of Ramon Xilotl Ramirez, ¶¶ 13, 14, Exhibit B, Appendix; Affidavit of Jaime Paz Y Puente Gutierrez, ¶ 4, Exhibit E, Appendix; Affidavit of Scott J. Atlas, ¶¶ 4, 5, 7, Exhibit C, Appendix; Affidavit of Barbara K. Strickland, *passim*, Exhibit D, Appendix. In one example, after a thorough criminal investigation by the Mexican consulate, capital charges against a Mexican national in Texas were dismissed. Affidavit of Arturo A. Dager Gomez, ¶ 10, Exhibit A, Appendix.

[30] Affidavit of Arturo A. Dager Gomez, ¶ 7, Exhibit A, Appendix.

[31] *Id.* at ¶¶ 8,9.

[32] *Id.* at ¶ 12; Declaration of Michael Iaria, ¶¶ 6-8, Exhibit H, Appendix.

In addition to aiding retained or appointed counsel, the consulate also helps capital defendants obtain qualified capital counsel.[33] Taken as a whole, this material overwhelmingly indicates the ability of the Mexican government to assist Torres at the time of his arrest and trials,[34] and the intention of the Mexican government to assist Mexican nationals charged with capital crimes in the United States at the time of Torres's arrest and trials.[35]

These services were all available to Torres. This assistance would have been offered at the time of his arrest, had the Mexican consulate been informed of Torres's detention under the Vienna Convention.[36] After the Mexican government was told of Torres's case, consular staff interviewed appellate counsel, Torres, and his family, and determined Torres had no criminal record in Mexico.[37] Mexico retained counsel to review Torres's case and assist his court-appointed attorney, and retained two investigators, a social worker, a mitigation specialist, two gang experts, and a bilingual neuropsychologist to develop evidence in Torres's case.[38] Torres provides this Court with information generated by these investigations. Torres has raised enough significant questions to warrant an evidentiary hearing on these issues.

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[33] Affidavit of Arturo A. Dager Gomez, ¶¶ 17, 18, Exhibit A, Appendix; Declaration of Michael Iaria, ¶¶ 4-5, Exhibit H, Appendix.

[34] Torres's first trial ended in a mistrial on the issue of guilt or innocence.

[35] As this Court found in *Valdez*, the Mexican government was prepared to assist a Mexican national facing a capital Oklahoma charge in 1989. *Valdez*, 46 P.3d at 710.

[36] *Id.* at ¶¶ 32-41; Affidavit of Ramon Xilotl Ramirez, ¶¶ 6-8 Exhibit B, Appendix.

[37] Affidavit of Arturo A. Dager Gomez, ¶ 30, Exhibit A, Appendix.

[38] *Id.* at ¶ 32.

In accordance with the *Avena* decision, I have thoroughly reviewed and reconsidered Torres's conviction and sentence in light of the consequences of the violation of his rights under the Vienna Convention. I have concluded that there is a possibility a significant miscarriage of justice occurred, as shown by Torres's claims, specifically: that the violation of his Vienna Convention rights contributed to trial counsel's ineffectiveness, that the jury did not hear significant evidence, and that the result of the trial is unreliable. This Court has decided to remand the case for an evidentiary hearing on the Vienna Convention and ineffective assistance of counsel issues. This decision comports with the *Avena* requirement of review and reconsideration.

LUMPKIN, J, DISSENTS

I must respectfully dissent to the Court's decision to stay the execution and remand the case for evidentiary hearing.

A review of the history of this case reveals the issue of ineffective assistance of counsel was raised and adjudicated in Appellant's direct appeal and that issue is now barred by *res judicata. See Torres v. State,* 1998 OK CR 40, 962, P. 2d 3. Appellant's original application for post-conviction relief, PC-1998-213, also sought to raise the issue of ineffective assistance of trial counsel. That application was denied in an unpublished opinion and not appealed. His second application for post-conviction relief was filed in case number PCD-2002-1047, but the two propositions of error did not raise any errors relating to ineffective assistance of counsel. *See Torres v. State,* 2002 OK Cr 35, 58, P.3d 214. The United States Supreme Court denied certiorari in that case on March 24, 2003. *See Torres v. State,* 538 U.S. 928, 123 S.Ct. 1580, 155 L.Ed.2d 323 (2003). The Appellant did not raise the issue of failure to notify him of his right to notify the Mexican consular office of his arrest in any of these appeals.

I find the legal issues barred by *res judicata* and waiver. I have reviewed the briefs and materials presented and do not find any of the proffered evidence brings into question the guilt of the Appellant. The Appellant's guilt was proven beyond a reasonable doubt by sufficient evidence as an aider and abetter. *See Conover v. State,* 933 P.2d 904, 914-16 (Okl..Cr.1997). Trial counsel was determined to have rendered effective assistance of counsel in the direct appeal pursuant to the standard established by the U.S. Supreme Court in *Strickland v. Washington,* 466 U.S. 688, 104 S.Ct. 2052, 80 L.Ed. 674 (1984) and that decision has not been found to be in error through the reviews completed by the federal courts during the years this case has proceeded through the review process.

As with any case that has been pending in some stage since 1993, someone will be able to look back and say something else could or should have been done. However, that is exactly what the U.S. Supreme Court in *Strickland* told us not to do. As was pointed out in the original opinion, the original trial ended in a mistrial in 1995. There were no surprises during the second trial. My reading of the materials submitted with this subsequent application for post-conviction relief reflect those items dealt with mitigation evidence. And, while mitigation evidence was presented during the trial leading to the verdict in this case the proffered items reveal more of the same type could have been presented, all be it in more depth and by different witnesses with better credentials. In reality, that could be said of every case of this type we review. Therefore, I can find no basis in law or fact to require a further evidentiary hearing.

I also do not find *Avena and other Mexican Nationals (Mexico v. United States),* 2004 I.C.J. ___ (March 31, 2004) binding on this Court. And, I must note the State raised a very interesting point of fact in Footnote 4 of their Response Brief filed in this case. In that footnote the State points out that Mexico has made conflicting admissions of when they learned of Appellant, i.e. December 1997 and March 1996. But more pointedly, the State says,

> In addition, trial counsel for Mr. Torres has advised undersigned that she contacted Mexico and informed them of Mr. Torres' case prior to his trial. The undersigned has been unable to obtain an affidavit from trial counsel and has filed a motion asking this Court to compel counsel to prepare an affidavit. This motion has not been ruled upon by this Court.

If this Court were to take any action, it should be to afford the State the opportunity to file an affidavit of trial counsel. If the affidavit comports with the proffer of the footnote then the entire issue is moot. Consular rights were afforded. Mexico was given notice.

Regardless, the legal basis for this claim has been available since Appellant's arrest in 1993. The *Avena* decision cannot revive a stale claim. At most *Avena* asked us to review the case to ensure Appellant received the benefit of the process that was due him, and which would have been assured him if he had been advised of his consular rights.

In *Avena*, the International Court of Justice stated in pertinent part:

> 152. . . . The Court has rejected Mexico's submission that, by way of *restitutio in integrum*, the United States is obliged to annul the convictions and sentences of all of the Mexican nationals the subject of its claims . . . . The review and reconsideration of conviction and sentence required by Article 36, paragraph 2, which is the appropriate remedy for breaches of Article 36, paragraph 1, has not been carried out. The Court considers that in these three cases it is for the United States to find an appropriate remedy having the nature of review and reconsideration according to the criteria indicated in paragraphs 138 *et. seq.* of the present Judgment.
>
> 153. For these reasons, The Court,
>
> . . .
>
> (7) By fourteen votes to one,
>
> *Finds* that, in relation to the 34 Mexican nationals referred to in paragraph 106(4) above, the United States of America deprived the United Mexican States of the right, in a timely fashion, to arrange for legal representation of the nationals, and thereby breached the obligations incumbent upon it under Article 36, paragraph 1(c) of the Convention . . .
>
> (9) By fourteen votes to one,
>
> . . .
>
> *Finds* that the appropriate reparation in this cases consists in the obligation of the United States of America to provide, by means of its own choosing, review and reconsideration of the convictions and

> sentence of the Mexican nationals referred to in subparagraphs (4), (5), (6) and (7) above, by taking account both of the violation of the rights set forth in Article 36 of the Convention and of paragraphs 138 to 141 of this Judgment . . .
>
> (11) Unanimously,
>
> *Finds* that, should Mexican nationals nonetheless be sentenced to severe penalties, without their rights under Article 36, paragraph 1(b) of the Convention having been respected, the United States of America shall provide, by means of its own choosing, review and reconsideration of the conviction and sentence, so as to allow full weight to be given to the violation of the rights set forth in the Convention, taking account of paragraphs 138 to 141 of this Judgment.

Without a doubt Appellant has been afforded his rights under *Avena*. He has been represented by competent lawyers at each stage of these proceedings and afforded all the rights guaranteed to citizens of the United States. That is reflected in the volumes of trial and appellate records amassed over the last eleven years. The argument that has been made in the voluminous filings on behalf of Appellant in this subsequent post-conviction application is that if we had known then what we know now we would have hired more expensive, experienced lawyers and provided more experts. That is very commendable and each citizen hopes his or her sovereign country would take that same individualized interest in them should the occasion arise. However, that is not the legal standard. If it were, we would be affording the same benefit to American citizens on a daily basis. Since it is not, we must judge by the Rule of Law that applies to all persons convicted of crimes.

Appellant's submissions constitute possible additional mitigation evidence. He has now had the opportunity to present that evidence to the Pardon and Parole Board, and ultimately to the Governor, for consideration. As I reviewed the proffered documents I could not find any matters that brought into question the validity of the judgment and sentence in this case. His ability to present these additional matters through the executive clemency process is another example of the due process that has been afforded to him. As a matter of law I do not find the subsequent application meets the requirements of 22 U.S. 2001, §1089.1(8)(9) and should be denied.

I am authorized to state that Judge Lile joins in this dissent.

HARRIS COUNTY PRE-TRIAL SERVICES AGENCY DEFENDANT INTERVIEW

DEFENDANT NAME:
MEDELLIN, JOSE ERNESTO

SPN:
01253605 D.A.

CHARGE INFORMATION

CHARGE AND BOND
CAPITAL MURDER 00000

COURT AND CASE NO.
339/066815701010

ADDITIONAL CHARGES:
FELONY 00 MISDEMEANOR 00 CLASS C 00
HOLDS __ HARRIS CO. WARRANTS N
FUGITIVE N

CRIMINAL/HISTORY SUMMARY

FELONY CONVICTIONS 00
MISDEMEANOR CONVICTIONS 01
PRESENTLY ON PROBATION Y
PRESENTLY ON PAROLE N
PREVIOUSLY FTA N

DEFENDANT REPORTED CONVICTIONS/
OPEN CASES

	ARREST DT	LOCATION	CHARGE	NAME USED	DISPOSITION
1.	1992	H.C.	CAW	SAME	1 Yr PROB
2.					
3.					
4.					

PERSON IDENTIFICATION INFORMATION

TRUE NAME
MEDELLIN, JOSE ERNESTO

ADDITIONAL SPN

____

POSSIBLE SPN

____

AKA/OTHER NAMES
NONE PER DEF

AGE 18 SEX M MARITAL STATUS S
DOB 030475 DOB2 ______

CITIZENSHIP N POB MEXICO HGT 506
WGT 130 EYE BRN HAIR BRN
SCARS/MARKS/TATOOS TT ARMS
DEFENDANT SPEAKS EN

SSN NONE DL NO. 15416954 DL STATE TX
SON 583279 FBI 212508RA9 SID TX04716188
HPD ______ INS. NO. _________

RESIDENCE INFORMATION

CURRENT ADDRESS 9211 BRACKLEY LN

APT NO. HSE CITY HOU STATE TX

ZIP 77088 COUNTY HARRIS APT NAME ______
HOME PHONE 713 8201946 RETURN Y

LENGTH HERE 003/Y
LIVES WITH MARIA/VENANCIO
RELATION PARENTS WK PHONE 713 6910001(DAD)
CHILDRENS 01/00 AGE RANGE FROM 01/Y TO __/__

ALTERNATE ADDRESS NONE

APT NO. _______ CITY _______ STATE ______
ZIP ______ HOME PHONE ________

LIVES WITH ____________
RELATIONSIP _____________
WORK PHONE _____________
CAN CONTACT _____________

PREVIOUS ADDRESS UNK W. 28TH ST.

APT NO. HSE CITY HOU STATE TX
ZIP 77 UNK HOME PHONE 713 UNK

LIVED WITH MARIA/VENANCIO
RELATION PARENTS

STILL THERE N CAN CONTACT N
LENGTH THERE 007/Y

OCCUPATIONAL INFORMATION

EMP _______ UNEMP ___/__ SCH PT TRN ___
DISABILITY NONE OTHER ___________

CURRENT EMPLOYER/SCHOOL NONE
POSITION/GRADE _________________
DEPT _________ SHIFT _______
ADDRESS _________________________
CITY ________ STATE ___ ZIP ____

WORK PHONE ______________________
CONTACT AT WORK ________________
CAN CONTACT __ LENGTH EMP ___/__

INCOME ___/__
SOURCE OF INCOME IF NOT EMP PARENTS
DEFENDANTS 01

SECOND JOB/SCHOOL HARRIS CO EDUC. CTR
ADDRESS IRVINGTON/610
PREVIOUS EMPLOYER B&S CONSTRUCTION
POSITION LABORER LENGTH EMP 006/M
INCOME 6.00 /HR

PREV EMP ADDRESS UNK SABLE
CITY HOU STATE TX ZIP 77 UNK
WORK PHONE 713UNK

VETERAN N BRANCH OF SERVICE NONE
H.S. GRADUATE N OBTAINED GED N
GRADE COMPLETED 0008
HEALTH PROBLEM N
TYPE OF HEALTH PROBLEM NONE
ALCOHOL PROBLEM N DRUG PROBLEM N

HARRIS COUNTY PRE-TRIAL SERVICES AGENCY DEFENDANT INTERVIEW

DEFENDANT NAME:
MEDELLIN, JOSE ERNESTO

SPN:
01253605 D.A.

FINANCIAL INFORMATION

SPOUSES EMPLOYER SEPARATED
ADDRESS ________________________
CITY _______ STATE ___ ZIP_____

SPOUSES INCOME ______ CASH ON HAND NONE
OTHER PROP OWNED NONE

BANK NAME(S) NONE ATM CHECKING NONE
AMT SAVINGS NONE
RESIDENCE STATUS 0
NAME ON LEASE DEF'S PARENTS

OTHER INCOME
SOURCE NONE INCOME ___ SOURCE ___ INCOME ___
SOURCE NONE INCOME ___ SOURCE ___ INCOME ___

MOTOR VEHICLE1 N MAKE/MODEL NONE
VALUE ____________ OWES _________
MOTOR VEHICLE2 N MAKE/MODEL NONE
VALUE ____________ OWES _________

MONTHLY EXPENSES
MORT/RENT 0 UTIL 0 FOOD 0 MEDICAL 0
CHILD CARE 0 INS 0 AUTO 0 CREDITORS 0
COURT ORDERED 15 OTHER 0

REFERENCES

CONTACTED ANYONE SINCE ARREST Y
WHO PARENTS PHONE NUMBER 713 8201946
ATTORNEY'S NAME NONE
ATTORNEY'S PHONE NUMBER ___________

NEXT OF KIN CAROLINA DELEON
RELATION ANT KNOWN DEF LIF
ADDRESS MARY ANN
HOME PH 713 9878647 WRK PH 713UNK
CONTACT Y VERIFIER ____ DATE/TIME _____

VERIFIED: ADDRESS __1__2__3__4__5
COMMENTS _______________________

REFERENCE NONE RELATION _________
KNOWN DEF _______ ADDRESS _____________
PHONE PH _________ WK PH _____________
CONTACT __ VERIFIER ____ DATE/TIME ____

VERIFIED: ADDRESS __1__2__3__4__5
COMMENTS _______________________

REFERENCE NONE RELATION _________
KNOWN DEF _______ ADDRESS _____________
PHONE PH _________ WK PH _____________
CONTACT __ VERIFIER ____ DATE/TIME ____

VERIFIED: ADDRESS __1__2__3__4__5
COMMENTS _______________________

COMMENTS

DEF HAD NO OTHER REFS-IMPORTANCE EXPLAINED.

BAIL CLASSIFICATION SCALE

VARIABLE	SCORING	POINTS
1: AUTO	ADD 1 POINT IF THE DEFENDANT HAS AN AUTOMOBILE	(+)0
2. TELEPHONE	ADD 1 POINT IF THE DEFENDANT HAS A PHONE IN HIS/HER RESIDENCE	(+)1
3. FULL TIME EMPLOYMENT OR SCHOOL OR HOMEMAKER	ADD 1 POINT IF DEFENDANT IS EITHER EMPLOYED OR ATTENDING SCHOOL FULL TIME, OR IF DEFENDANT IS A FULL TIME HOMEMAKER	(+)0
4. NUCLEAR FAMILY	ADD 1 POINT IF DEFENDANT LIVES ALONE OR WITH HIS/HER SPOUSE AND OR CHILDREN	(+)0
5. UNDER 21 YEARS OLD	SUBTRACT 1 POINT IF THE DEFENDANT IS UNDER 21 YEARS OLD.	(+)1
6. PRIOR FAILURES TO APPEAR	SUBTRACT 1 POINT IF DEFENDANT HAS ONE OR MORE VERIFIED FTA'S	(+)0
7. PRIOR MISDEMEANORS	SUBTRACT 1 POINT IF DEFENDANT HAS 2 OR MORE MISDEMEANOR CONVICTIONS	(+)0
8. PRIOR FELONIES	SUBTRACT 2 POINTS IF THE DEFENDANT HAS 2 OR MORE PRIOR FELONY CONVICTIONS	(+)0
TOTAL	RANGE +4 TO –5	000

INTERVIEW PARTICULARS

INTERVIEWER 01263485
DATE/TIME 062993/1455
DATE OF ARREST 062993
JIMS CHECKS PSW
TCIC WANTS CLR
NCIC WANTS CLR
HPD RAP _____
CRISS CROSS ______

SHIFT 2
LOCATION HPD
TCIC HIST ATT
NCIC HIST CLR
SO ID CLR
OTHER ____

JUDICIAL DECISION

DENIED _________ APPROVED _________

DATE _________ DATE _________

AFFIDAVIT OF MANUEL PEREZ-CARDENAS

STATE OF TEXAS §
COUNTY OF HARRIS §

My name is Manuel Perez Cardenas, Consul General of Mexico in Houston, Texas. My current address is 1440 Westoffice Drive, Houston Texas 77042. I am above the age of eighteen (18) years and am competent in all respects to make this oath. I am personally acquainted with the facts herein stated.

I am the Consul General of Mexico in Houston, Texas. One of the duties of the Mexican Consulate in Houston is to advise any Mexican National who, having been arrested or detained for some crime committed here, exercises his right under Article 36 of the Vienna Convention on Consular Relations of 1963, to contact the Mexican Consulate for help in responding to the fact of his detention, dealing with the arresting authority, and arranging for representation for local legal counsel. When Jose Ernesto Medellin was arrested for capital murder in Harris County he was not advised of his right to contact with his Consulate, the Mexican Consulate was not timely informed. Had the Mexican Consulate been informed of Jose Ernesto Medellin arrest, an officer of the Consulate would have contacted him immediately to explain to him the full significance and importance of his right under Miranda Warning included to have legal counsel present to serve as an intermediary between himself and the police in the custodial setting (particularly in a capital charge). Had the Mexican Consulate been timely informed of Jose Ernesto Medellin's arrest, an officer of the Consulate would have immediately arranged to have legal counsel present during any custodial interrogation. Finally, had the Mexican Consulate been told Jose Ernesto Medellin's detention, the Consulate representative would have strongly advised him that he had a right not to speak to the police except on the advice and in the presence of his legal counsel, and that it would be in his best interest not to speak to the police unless and until his lawyer might advise that he do so. "Nothing included in this document shall be construed or interpreted as a waiver of the immunities, privileges and rights of Consul General Manuel Perez Cardenas, established by the Vienna Convent on Consular Relations, the US-Mexico Consular Convention of 1942, and international law".

MANUEL PEREZ-CARDENAS
Manuel Perez-Cardenas
Consul General of Mexico in Houston

SIGNED under oath before me on March 24, 1998

[NOTARY STAMP]
LISA MILSTEIN
Notary Public, State of Texas
My Commission Expires
04-15-2001

LISA MILSTEIN
NOTARY PUBLIC, State of Texas

INTERNATIONAL COURT OF JUSTICE

YEAR 2004

2004
31 March
General List
No. 128

31 March 2004

CASE CONCERNING AVENA AND OTHER MEXICAN NATIONALS

(MEXICO *v.* UNITED STATES OF AMERICA)

Facts of the case — Article 36 of the Vienna Convention on Consular Relations of 24 April 1963.

* *

Mexico's objection to the United States objections to jurisdiction and admissibility —United States objections not presented as preliminary objections —Article 79 of Rules of Court not pertinent in present case.

* *

Jurisdiction of the Court.

First United States objection to jurisdiction — Contention that Mexico's submissions invite the Court to rule on the operation of the United States criminal justice system — Jurisdiction of Court to determine the nature and extent of obligations arising under Vienna Convention — Enquiry into the conduct of criminal proceedings in United States courts a matter belonging to the merits.

Second United States objection to jurisdiction — Contention that the first submission of Mexico's Memorial is excluded from the Court's jurisdiction — Mexico defending an interpretation of the Vienna Convention whereby not only the absence of consular notification but also the arrest, detention, trial and conviction of its nationals were unlawful, failing such notification — Interpretation of Vienna Convention a matter within the Court's jurisdiction.

Third United States objection to jurisdiction — Contention that Mexico's submissions on remedies go beyond the Court's jurisdiction — Jurisdiction of Court to consider the question of remedies —Question whether or how far the Court may order the requested remedies a matter belonging to the merits.

Fourth United States objection to jurisdiction —Contention that the Court lacks jurisdiction to determine whether or not consular notification is a human right — Question of interpretation of Vienna Convention.

* *

Admissibility of Mexico's claims.

First United States objection to admissibility — Contention that Mexico's submissions on remedies seek to have the Court function as a court of criminal appeal — Question belonging to the merits.

Second United States objection to admissibility — Contention that Mexico's claims to exercise its right of diplomatic protection are inadmissible on grounds that local remedies have not been exhausted — Interdependence in the present case of rights of the State and of individual rights — Mexico requesting the Court to rule on the violation of rights which it suffered both directly and through the violation of individual rights of its nationals — Duty to exhaust local remedies does not apply to such a request.

Third United States objection to admissibility — Contention that certain Mexican nationals also have United States nationality — Question belonging to the merits.

Fourth United States objection to admissibility — Contention that Mexico had actual knowledge of a breach but failed to bring such breach to the attention of the United States or did so only after considerable delay — No contention in the present case of any prejudice caused by such delay — No implied waiver by Mexico of its rights.

Fifth United States objection to admissibility — Contention that Mexico invokes standards that it does not follow in its own practice —Nature of Vienna Convention precludes such an argument.

* *

Article 36, paragraph 1 — Mexican nationality of 52 individuals concerned —United States has not proved its contention that some were also United States nationals.

Article 36, paragraph 1 (b) *— Consular information — Duty to provide consular information as soon as arresting authorities realize that arrested person is a foreign national, or have grounds for so believing — Provision of consular information in parallel with reading of "Miranda rights" —Contention that seven individuals stated at the time of arrest that they were United States nationals —Interpretation of phrase "without delay" — Violation by United States of the obligation to provide consular information in 51 cases.*

Consular notification — Violation by United States of the obligation of consular notification in 49 cases.

Article 36, paragraph 1 (a) *and* (c) *— Interrelated nature of the three subparagraphs of paragraph 1 — Violation by United States of the obligation to enable Mexican consular officers to communicate with, have access to and visit their nationals in 49 cases — Violation by United States of the obligation to enable Mexican consular officers to arrange for legal representation of their nationals in 34 cases.*

Article 36, paragraph 2 —"Procedural default" rule —Possibility of judicial remedies still open in 49 cases — Violation by United States of its obligations under Article 36, paragraph 2, in three cases.

* *

Legal consequences of the breach.

Question of adequate reparation for violations of Article 36 — Review and reconsideration by United States courts of convictions and sentences of the Mexican nationals — Choice of means left to United States — Review and reconsideration to be carried out by taking account of violation of Vienna Convention rights — "Procedural default" rule.

Judicial process suited to the task of review and reconsideration — Clemency process, as currently practised within the United States criminal justice system, not sufficient in itself to serve as appropriate means of "review and reconsideration" — Appropriate clemency procedures can supplement judicial review and reconsideration.

Mexico requesting cessation of wrongful acts and guarantees and assurances of non-repetition — No evidence to establish "regular and continuing" pattern of breaches by United States of Article 36 of Vienna Convention — Measures taken by United States to comply with its obligations under Article 36, paragraph 1 — Commitment undertaken by United States to ensure implementation of its obligations under that provision.

* *

No a contrario *argument can be made in respect of the Court's findings in the present Judgment concerning Mexican nationals.*

* *

United States obligations declared in Judgment replace those arising from Provisional Measures Order of 5 February 2003 — In the three cases where the United States violated its obligations under Article 36, paragraph 2, it must find an appropriate remedy having the nature of review and reconsideration according to the criteria indicated in the Judgment.

JUDGMENT

Present: *President* SHI; *Vice-President* RANJEVA; *Judges* GUILLAUME, KOROMA, VERESHCHETIN, HIGGINS, PARRA-ARANGUREN, KOOIJMANS, REZEK, AL-KHASAWNEH, BUERGENTHAL, ELARABY, OWADA, TOMKA; *Judge* ad hoc SEPÚLVEDA; *Registrar* COUVREUR.

In the case concerning Avena and other Mexican nationals,

between

the United Mexican States,

represented by

H.E. Mr. Juan Manuel Gómez-Robledo, Ambassador, former Legal Adviser, Ministry of Foreign Affairs, Mexico City,

as Agent;

H.E. Mr. Santiago Oñate, Ambassador of Mexico to the Kingdom of the Netherlands,

as Agent (until 12 February 2004);

Mr. Arturo A. Dager, Legal Adviser, Ministry of Foreign Affairs, Mexico City, Ms María del Refugio González Domínguez, Chief, Legal Co-ordination Unit, Ministry of Foreign Affairs, Mexico City,

as Agents (from 2 March 2004);

H.E. Ms Sandra Fuentes Berain, Ambassador-Designate of Mexico to the Kingdom of the Netherlands,

as Agent (from 17 March 2004);

Mr. Pierre-Marie Dupuy, Professor of Public International Law at the University of Paris II (Panthéon-Assas) and at the European University Institute, Florence,

Mr. Donald Francis Donovan, Attorney at Law, Debevoise & Plimpton, New York,

Ms Sandra L. Babcock, Attorney at Law, Director of the Mexican Capital Legal Assistance Programme,

Mr. Carlos Bernal, Attorney at Law, Noriega y Escobedo, and Chairman of the Commission on International Law at the Mexican Bar Association, Mexico City,

Ms Katherine Birmingham Wilmore, Attorney at Law, Debevoise & Plimpton, London,

Mr. Dietmar W. Prager, Attorney at Law, Debevoise & Plimpton, New York,

Ms Socorro Flores Liera, Chief of Staff, Under-Secretariat for Global Affairs and Human Rights, Ministry of Foreign Affairs, Mexico City,

Mr. Víctor Manuel Uribe Aviña, Head of the International Litigation Section, Legal Adviser's Office, Ministry of Foreign Affairs, Mexico City,

as Counsellors and Advocates;

Mr. Erasmo A. Lara Cabrera, Head of the International Law Section, Legal Adviser's Office, Ministry of Foreign Affairs, Mexico City,

Ms Natalie Klein, Attorney at Law, Debevoise & Plimpton, New York,

Ms Catherine Amirfar, Attorney at Law, Debevoise & Plimpton, New York,

Mr. Thomas Bollyky, Attorney at Law, Debevoise & Plimpton, New York,

Ms Cristina Hoss, Research Fellow at the Max Planck Institute for Comparative Public Law and International Law, Heidelberg,

Mr. Mark Warren, International Law Researcher, Ottawa,

as Advisers;

Mr. Michel L'Enfant, Debevoise & Plimpton, Paris,

as Assistant,

and

the United States of America,

represented by

The Honourable William H. Taft, IV, Legal Adviser, United States Department of State,

as Agent;

Mr. James H. Thessin, Principal Deputy Legal Adviser, United States Department of State,

as Co-Agent;

Ms Catherine W. Brown, Assistant Legal Adviser for Consular Affairs, United States Department of State,

Mr. D. Stephen Mathias, Assistant Legal Adviser for United Nations Affairs, United States Department of State,

Mr. Patrick F. Philbin, Associate Deputy Attorney General, United States Department of Justice,

Mr. John Byron Sandage, Attorney-Adviser for United Nations Affairs, United States Department of State,

Mr. Thomas Weigend, Professor of Law and Director of the Institute of Foreign and International Criminal Law, University of Cologne,

Ms Elisabeth Zoller, Professor of Public Law, University of Paris II (Panthéon-Assas),

as Counsel and Advocates;

Mr. Jacob Katz Cogan, Attorney-Adviser for United Nations Affairs, United States Department of State,

Ms Sara Criscitelli, Member of the Bar of the State of New York,

Mr. Robert J. Erickson, Principal Deputy Chief, Criminal Appellate Section, United States Department of Justice,

Mr. Noel J. Francisco, Deputy Assistant Attorney General, Office of Legal Counsel, United States Department of Justice,

Mr. Steven Hill, Attorney-Adviser for Economic and Business Affairs, United States Department of State,

Mr. Clifton M. Johnson, Legal Counsellor, United States Embassy, The Hague,

Mr. David A. Kaye, Deputy Legal Counsellor, United States Embassy, The Hague,

Mr. Peter W. Mason, Attorney-Adviser for Consular Affairs, United States Department of State,

as Administrative Staff,

THE COURT,

composed as above,

after deliberation,

delivers the following Judgment:

1. On 9 January 2003 the United Mexican States (hereinafter referred to as "Mexico") filed in the Registry of the Court an Application instituting proceedings against the United States of America (hereinafter referred to as the "United States") for "violations of the Vienna Convention on Consular Relations" of 24 April 1963 (hereinafter referred to as the "Vienna Convention") allegedly committed by the United States.

In its Application, Mexico based the jurisdiction of the Court on Article 36, paragraph 1, of the Statute of the Court and on Article I of the Optional Protocol concerning the Compulsory Settlement of Disputes, which accompanies the Vienna Convention (hereinafter referred to as the "Optional Protocol").

2. Pursuant to Article 40, paragraph 2, of the Statute, the Application was forthwith communicated to the Government of the United States; and, in accordance with paragraph 3 of that Article, all States entitled to appear before the Court were notified of the Application.

3. On 9 January 2003, the day on which the Application was filed, the Mexican Government also filed in the

Registry of the Court a request for the indication of provisional measures based on Article 41 of the Statute and Articles 73, 74 and 75 of the Rules of Court.

By an Order of 5 February 2003, the Court indicated the following provisional measures:

> "*(a)* The United States of America shall take all measures necessary to ensure that Mr. César Roberto Fierro Reyna, Mr. Roberto Moreno Ramos and Mr. Osvaldo Torres Aguilera are not executed pending final judgment in these proceedings;
>
> *(b)* The Government of the United States of America shall inform the Court of all measures taken in implementation of this Order."

It further decided that, "until the Court has rendered its final judgment, it shall remain seised of the matters" which formed the subject of that Order.

In a letter of 2 November 2003, the Agent of the United States advised the Court that the United States had "informed the relevant state authorities of Mexico's application"; that, since the Order of 5 February 2003, the United States had "obtained from them information about the status of the fifty-four cases, including the three cases identified in paragraph 59 (I) *(a)* of that Order"; and that the United States could "confirm that none of the named individuals [had] been executed".

4. In accordance with Article 43 of the Rules of Court, the Registrar sent the notification referred to in Article 63, paragraph 1, of the Statute to all States parties to the Vienna Convention or to that Convention and the Optional Protocol.

5. By an Order of 5 February 2003, the Court, taking account of the views of the Parties, fixed 6 June 2003 and 6 October 2003, respectively, as the time-limits for the filing of a Memorial by Mexico and of a Counter-Memorial by the United States.

6. By an Order of 22 May 2003, the President of the Court, on the joint request of the Agents of the two Parties, extended to 20 June 2003 the time-limit for the filing of the Memorial; the time-limit for the filing of the Counter-Memorial was extended, by the same Order, to 3 November 2003.

By a letter dated 20 June 2003 and received in the Registry on the same day, the Agent of Mexico informed the Court that Mexico was unable for technical reasons to file the original of its Memorial on time and accordingly asked the Court to decide, under Article 44, paragraph 3, of the Rules of Court, that the filing of the Memorial after the expiration of the time-limit fixed therefor would be considered as valid; that letter was accompanied by two electronic copies of the Memorial and its annexes. Mexico having filed the original of the Memorial on 23 June 2003 and the United States having informed the Court, by a letter of 24 June 2003, that it had no comment to make on the matter, the Court decided on 25 June 2003 that the filing would be considered as valid.

7. In a letter of 14 October 2003, the Agent of Mexico expressed his Government's wish to amend its submissions in order to include therein the cases of two Mexican nationals, Mr. Víctor Miranda Guerrero and Mr. Tonatihu Aguilar Saucedo, who had been sentenced to death, after the filing of Mexico's Memorial, as a result of criminal proceedings in which, according to Mexico, the United States had failed to comply with its obligations under Article 36 of the Vienna Convention.

In a letter of 2 November 2003, under cover of which the United States filed its Counter-Memorial within the time-limit prescribed, the Agent of the United States informed the Court that his Government objected to the amendment of Mexico's submissions, on the grounds that the request was late, that Mexico had submitted no evidence concerning the alleged facts and that there was not enough time for the United States to investigate them.

In a letter received in the Registry on 28 November 2003, Mexico responded to the United States objection and at the same time amended its submissions so as to withdraw its request for relief in the cases of two Mexican nationals mentioned in the Memorial, Mr. Enrique Zambrano Garibi and Mr. Pedro Hernández Alberto, having come to the conclusion that the former had dual Mexican and United States nationality and that the latter had been informed of his right of consular notification prior to interrogation.

On 9 December 2003, the Registrar informed Mexico and the United States that, in order to ensure the procedural equality of the Parties, the Court had decided not to authorize the amendment of Mexico's submissions so as to include the two additional Mexican nationals mentioned above. He also informed the Parties that the Court had taken note that the United States had made no objection to the withdrawal by Mexico of its request for relief in the cases of Mr. Zambrano and Mr. Hernández.

8. On 28 November 2003 and 2 December 2003, Mexico filed various documents which it wished to produce in accordance with Article 56 of the Rules of Court. By letters dated 2 December 2003 and 5 December 2003, the Agent of the United States informed the Court that his Government did not object to the production of these new documents and that it intended to exercise its right to comment upon these documents and to submit documents in support of its comments, pursuant to paragraph 3 of that Article. By letters dated 9 December 2003, the Registrar informed the Parties that the Court had taken note that the United States had no objection to the production of these documents and that accordingly counsel would be free to refer to them in the course of the hearings. On 10 December 2003, the Agent of the United States filed the comments of his Government on the new documents produced by Mexico, together with a number of documents in support of those comments.

9. Since the Court included upon the Bench no judge of Mexican nationality, Mexico availed itself of its right under Article 31, paragraph 2, of the Statute to choose a judge *ad hoc* to sit in the case: it chose Mr. Bernardo Sepúlveda.

10. Pursuant to Article 53, paragraph 2, of its Rules, the Court, having consulted the Parties, decided that copies of the pleadings and documents annexed would be made accessible to the public on the opening of the oral proceedings.

11. Public sittings were held between 15 and 19 December 2003, at which the Court heard the oral arguments and replies of:

For Mexico:	H.E. Mr. Juan Manuel Gómez-Robledo, Ms Sandra L. Babcock, Mr. Víctor Manuel Uribe Aviña, Mr. Donald Francis Donovan, Ms Katherine Birmingham Wilmore, H.E. Mr. Santiago Oñate, Ms Socorro Flores Liera, Mr. Carlos Bernal,

Mr. Dietmar W. Prager,
Mr. Pierre-Marie Dupuy.

For the United States: The Honourable William H. Taft, IV,
Ms Elisabeth Zoller,
Mr. Patrick F. Philbin,
Mr. John Byron Sandage,
Ms Catherine W. Brown,
Mr. D. Stephen Mathias,
Mr. James H. Thessin,
Mr. Thomas Weigend.

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12. In its Application, Mexico formulated the decision requested in the following terms:

"The Government of the United Mexican States therefore asks the Court to adjudge and declare:

(1) that the United States, in arresting, detaining, trying, convicting, and sentencing the 54 Mexican nationals on death row described in this Application, violated its international legal obligations to Mexico, in its own right and in the exercise of its right of consular protection of its nationals, as provided by Articles 5 and 36, respectively of the Vienna Convention;

(2) that Mexico is therefore entitled to *restitutio in integrum*;

(3) that the United States is under an international legal obligation not to apply the doctrine of procedural default, or any other doctrine of its municipal law, to preclude the exercise of the rights afforded by Article 36 of the Vienna Convention;

(4) that the United States is under an international legal obligation to carry out in conformity with the foregoing international legal obligations any future detention of or criminal proceedings against the 54 Mexican nationals on death row or any other Mexican national in its territory, whether by a constituent, legislative, executive, judicial or other power, whether that power holds a superior or a subordinate position in the organization of the United States, and whether that power's functions are international or internal in character;

(5) that the right to consular notification under the Vienna Convention is a human right;

and that, pursuant to the foregoing international legal obligations,

(1) the United States must restore the *status quo ante*, that is, re-establish the situation that existed before the detention of, proceedings against, and convictions and sentences of, Mexico's nationals in violation of the United States international legal obligations;

(2) the United States must take the steps necessary and sufficient to ensure that the provisions of its municipal law enable full effect to be given to the purposes for which the rights afforded by Article 36 are intended;

(3) the United States must take the steps necessary and sufficient to establish a meaningful remedy at law for violations of the rights afforded to Mexico

and its nationals by Article 36 of the Vienna Convention, including by barring the imposition, as a matter of municipal law, of any procedural penalty for the failure timely to raise a claim or defence based on the Vienna Convention where competent authorities of the United States have breached their obligation to advise the national of his or her rights under the Convention; and

(4) the United States, in light of the pattern and practice of violations set forth in this Application, must provide Mexico a full guarantee of the non-repetition of the illegal acts."

13. In the course of the written proceedings, the following submissions were presented by the Parties:

On behalf of the Government of Mexico,

in the Memorial:

"For these reasons, . . . the Government of Mexico respectfully requests the Court to adjudge and declare

(1) that the United States, in arresting, detaining, trying, convicting, and sentencing the fifty-four Mexican nationals on death row described in Mexico's Application and this Memorial, violated its international legal obligations to Mexico, in its own right and in the exercise of its right of diplomatic protection of its nationals, as provided by Article 36 of the Vienna Convention;

(2) that the obligation in Article 36 (1) of the Vienna Convention requires notification before the competent authorities of the receiving State interrogate the foreign national or take any other action potentially detrimental to his or her rights;

(3) that the United States, in applying the doctrine of procedural default, or any other doctrine of its municipal law, to preclude the exercise and review of the rights afforded by Article 36 of the Vienna Convention, violated its international legal obligations to Mexico, in its own right and in the exercise of its right of diplomatic protection of its nationals, as provided by Article 36 of the Vienna Convention; and

(4) that the United States is under an international legal obligation to carry out in conformity with the foregoing international legal obligations any future detention of or criminal proceedings against the fifty-four Mexican nationals on death row and any other Mexican national in its territory, whether by a constituent, legislative, executive, judicial or other power, whether that power holds a superior or a subordinate position in the organization of the United States, and whether that power's functions are international or internal in character;

and that, pursuant to the foregoing international legal obligations,

(1) Mexico is entitled to *restitutio in integrum* and the United States therefore is under an obligation to restore the *status quo ante*, that is, reestablish the situation that existed at the time of the detention and prior to the interrogation of, proceedings against, and convictions and sentences of, Mexico's nationals in violation of the United States' international legal obligations, specifically by, among other things,

(a) vacating the convictions of the fifty-four Mexican nationals;

(b) vacating the sentences of the fifty-four Mexican nationals;

(*c*) excluding any subsequent proceedings against the fifty-four Mexican nationals any statements and confessions obtained from them prior to notification of their rights to consular notification and access;

(*d*) the application of any procedural penalty for a Mexican national's failure timely to raise a claim or defense based on the Vienna Convention where competent authorities of the United States have breached their obligation to advise the national of his rights under the Convention;

(*e*) preventing the application of any municipal law doctrine or judicial holding that prevents a court in the United States from providing a remedy, including the relief to which this Court holds that Mexico is entitled here, to a Mexican national whose Article 36 rights have been violated; and

(*f*) preventing the application of any municipal law doctrine or judicial holding that requires an individualized showing of prejudice as a prerequisite to relief for the violations of Article 36;

(2) United States, in light of the regular and continuous violations set forth in Mexico's Application and Memorial, is under an obligation to take all legislative, executive, and judicial steps necessary to:

(*a*) ensure that the regular and continuing violations of the Article 36 consular notification, access, and assistance rights of Mexico and its nationals cease;

(*b*) guarantee that its competent authorities, of federal, state, and local jurisdiction, maintain regular and routine compliance with their Article 36 obligations;

(*c*) that its judicial authorities cease applying, and guarantee that in the future they will not apply:

(i) any procedural penalty for a Mexican national's failure timely to raise a claim or defense based on the Vienna Convention where competent authorities of the United States have breached their obligation to advise the national of his or her rights under the Convention;

(ii) any municipal law doctrine or judicial holding that prevents a court in the United States from providing a remedy, including the relief to which this Court holds that Mexico is entitled here, to a Mexican national whose Article 36 rights have been violated; and

(iii) any municipal law doctrine or judicial holding that requires an individualized showing of prejudice as a prerequisite to relief for the Vienna Convention violations shown here."

On behalf of the Government of the United States,

in the Counter-Memorial:

"On the basis of the facts and arguments set out above, the Government of the United States of America requests that the Court adjudge and declare that the claims of the United Mexican States are dismissed."

14. At the oral proceedings, the following submissions were presented by the Parties:

On behalf of the Government of Mexico,

"The Government of Mexico respectfully requests the Court to adjudge and declare

(1) That the United States of America, in arresting, detaining, trying, convicting, and sentencing the 52 Mexican nationals on death row described in Mexico's Memorial, violated its international legal obligations to Mexico, in its own right and in the exercise of its right to diplomatic protection of its nationals, by failing to inform, without delay, the 52 Mexican nationals after their arrest of their right to consular notification and access under Article 36 (1) *(b)* of the Vienna Convention on Consular Relations, and by depriving Mexico of its right to provide consular protection and the 52 nationals' right to receive such protection as Mexico would provide under Article 36 (1) *(a)* and *(c)* of the Convention;

(2) That the obligation in Article 36 (1) of the Vienna Convention requires notification of consular rights and a reasonable opportunity for consular access before the competent authorities of the receiving State take any action potentially detrimental to the foreign national's rights;

(3) That the United States of America violated its obligations under Article 36 (2) of the Vienna Convention by failing to provide meaningful and effective review and reconsideration of convictions and sentences impaired by a violation of Article 36 (1); by substituting for such review and reconsideration clemency proceedings; and by applying the "procedural default" doctrine and other municipal law doctrines that fail to attach legal significance to an Article 36 (1) violation on its own terms;

(4) That pursuant to the injuries suffered by Mexico in its own right and in the exercise of diplomatic protection of its nationals, Mexico is entitled to full reparation for those injuries in the form of *restitutio in integrum*;

(5) That this restitution consists of the obligation to restore the *status quo ante* by annulling or otherwise depriving of full force or effect the convictions and sentences of all 52 Mexican nationals;

(6) That this restitution also includes the obligation to take all measures necessary to ensure that a prior violation of Article 36 shall not affect the subsequent proceedings;

(7) That to the extent that any of the 52 convictions or sentences are not annulled, the United States shall provide, by means of its own choosing, meaningful and effective review and reconsideration of the convictions and sentences of the 52 nationals, and that this obligation cannot be satisfied by means of clemency proceedings or if any municipal law rule or doctrine inconsistent with paragraph (3) above is applied; and

(8) That the United States of America shall cease its violations of Article 36 of the Vienna Convention with regard to Mexico and its 52 nationals and shall provide appropriate guarantees and assurances that it shall take measures sufficient to

achieve increased compliance with Article 36 (1) and to ensure compliance with Article 36 (2)."

On behalf of the Government of the United States,

> "On the basis of the facts and arguments made by the United States in its Counter-Memorial and in these proceedings, the Government of the United States of America requests that the Court, taking into account that the United States has conformed its conduct to this Court's Judgment in the *LaGrand Case (Germany v. United States of America)*, not only with respect to German nationals but, consistent with the Declaration of the President of the Court in that case, to all detained foreign nationals, adjudge and declare that the claims of the United Mexican States are dismissed."

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15. The present proceedings have been brought by Mexico against the United States on the basis of the Vienna Convention, and of the Optional Protocol providing for the jurisdiction of the Court over "disputes arising out of the interpretation or application" of the Convention. Mexico and the United States are, and were at all relevant times, parties to the Vienna Convention and to the Optional Protocol. Mexico claims that the United States has committed breaches of the Vienna Convention in relation to the treatment of a number of Mexican nationals who have been tried, convicted and sentenced to death in criminal proceedings in the United States. The original claim related to 54 such persons, but as a result of subsequent adjustments to its claim made by Mexico (see paragraph 7 above), only 52 individual

cases are involved. These criminal proceedings have been taking place in nine different States of the United States, namely California (28 cases), Texas (15 cases), Illinois (three cases), Arizona (one case), Arkansas (one case), Nevada (one case), Ohio (one case), Oklahoma (one case) and Oregon (one case), between 1979 and the present.

16. For convenience, the names of the 52 individuals, and the numbers by which their cases will be referred to, are set out below:

1. Carlos Avena Guillen
2. Héctor Juan Ayala
3. Vicente Benavides Figueroa
4. Constantino Carrera Montenegro
5. Jorge Contreras López
6. Daniel Covarrubias Sánchez
7. Marcos Esquivel Barrera
8. Rubén Gómez Pérez
9. Jaime Armando Hoyos
10. Arturo Juárez Suárez
11. Juan Manuel López
12. José Lupercio Casares
13. Luis Alberto Maciel Hernández
14. Abelino Manríquez Jáquez
15. Omar Fuentes Martínez
    (a.k.a. Luis Aviles de la Cruz)
16. Miguel Angel Martínez Sánchez
17. Martín Mendoza García
18. Sergio Ochoa Tamayo
19. Enrique Parra Dueñas
20. Juan de Dios Ramírez Villa
21. Magdaleno Salazar
22. Ramón Salcido Bojórquez
23. Juan Ramón Sánchez Ramírez
24. Ignacio Tafoya Arriola

25. Alfredo Valdez Reyes
26. Eduardo David Vargas
27. Tomás Verano Cruz
28. [Case withdrawn]
29. Samuel Zamudio Jiménez
30. Juan Carlos Alvarez Banda
31. César Roberto Fierro Reyna
32. Héctor García Torres
33. Ignacio Gómez
34. Ramiro Hernández Llanas
35. Ramiro Rubí Ibarra
36. Humberto Leal García
37. Virgilio Maldonado
38. José Ernesto Medellín Rojas
39. Roberto Moreno Ramos
40. Daniel Angel Plata Estrada
41. Rubén Ramírez Cárdenas
42. Félix Rocha Díaz
43. Oswaldo Regalado Soriano
44. Edgar Arias Tamayo
45. Juan Caballero Hernández
46. Mario Flores Urbán
47. Gabriel Solache Romero
48. Martín Raúl Fong Soto
49. Rafael Camargo Ojeda
50. [Case withdrawn]
51. Carlos René Pérez Gutiérrez
52. José Trinidad Loza
53. Osvaldo Netzahualcóyotl Torres Aguilera
54. Horacio Alberto Reyes Camarena

17. The provisions of the Vienna Convention of which Mexico alleges violations are contained in Article 36. Paragraphs 1 and 2 of this Article are set out respectively in paragraphs 50 and 108 below. Article 36

relates, according to its title, to "Communication and contact with nationals of the sending State". Paragraph 1 *(b)* of that Article provides that if a national of that State "is arrested or committed to prison or to custody pending trial or is detained in any other manner", and he so requests, the local consular post of the sending State is to be notified. The Article goes on to provide that the "competent authorities of the receiving State" shall "inform the person concerned without delay of his rights" in this respect. Mexico claims that in the present case these provisions were not complied with by the United States authorities in respect of the 52 Mexican nationals the subject of its claims. As a result, the United States has according to Mexico committed breaches of paragraph 1 *(b)*; moreover, Mexico claims, for reasons to be explained below (see paragraphs 98 *et seq.*), that the United States is also in breach of paragraph 1 *(a)* and *(c)* and of paragraph 2 of Article 36, in view of the relationship of these provisions with paragraph 1 *(b)*.

18. As regards the terminology employed to designate the obligations incumbent upon the receiving State under Article 36, paragraph 1 *(b)*, the Court notes that the Parties have used the terms "inform" and "notify" in differing senses. For the sake of clarity, the Court, when speaking in its own name in the present Judgment, will use the word "inform" when referring to an individual being made aware of his rights under that subparagraph and the word "notify" when referring to the giving of notice to the consular post.

19. The underlying facts alleged by Mexico may be briefly described as follows: some are conceded by the United States, and some disputed. Mexico states that all the individuals the subject of its claims were Mexican nationals at the time of their arrest. It further contends

that the United States authorities that arrested and interrogated these individuals had sufficient information at their disposal to be aware of the foreign nationality of those individuals. According to Mexico's account, in 50 of the specified cases, Mexican nationals were never informed by the competent United States authorities of their rights under Article 36, paragraph 1 *(b)*, of the Vienna Convention and, in the two remaining cases, such information was not provided "without delay", as required by that provision. Mexico has indicated that in 29 of the 52 cases its consular authorities learned of the detention of the Mexican nationals only after death sentences had been handed down. In the 23 remaining cases, Mexico contends that it learned of the cases through means other than notification to the consular post by the competent United States authorities under Article 36, paragraph 1 *(b)*. It explains that in five cases this was too late to affect the trials, that in 15 cases the defendants had already made incriminating statements, and that it became aware of the other three cases only after considerable delay.

20. Of the 52 cases referred to in Mexico's final submissions, 49 are currently at different stages of the proceedings before United States judicial authorities at state or federal level, and in three cases, those of Mr. Fierro (case No. 31), Mr. Moreno (case No. 39) and Mr. Torres (case No. 53), judicial remedies within the United States have already been exhausted. The Court has been informed of the variety of types of proceedings and forms of relief available in the criminal justice systems of the United States, which can differ from state to state. In very general terms, and according to the description offered by both Parties in their pleadings, it appears that the 52 cases may be classified into three categories: 24 cases which are currently in direct appeal; 25 cases in

which means of direct appeal have been exhausted, but post-conviction relief *(habeas corpus)*, either at State or at federal level, is still available; and three cases in which no judicial remedies remain. The Court also notes that, in at least 33 cases, the alleged breach of the Vienna Convention was raised by the defendant either during pre-trial, at trial, on appeal or in *habeas corpus* proceedings, and that some of these claims were dismissed on procedural or substantive grounds and others are still pending. To date, in none of the 52 cases have the defendants had recourse to the clemency process.

21. On 9 January 2003, the day on which Mexico filed its Application and a request for the indication of provisional measures, all 52 individuals the subject of the claims were on death row. However, two days later the Governor of the State of Illinois, exercising his power of clemency review, commuted the sentences of all convicted individuals awaiting execution in that State, including those of three individuals named in Mexico's Application (Mr. Caballero (case No. 45), Mr. Flores (case No. 46) and Mr. Solache (case No. 47)). By a letter dated 20 January 2003, Mexico informed the Court that, further to that decision, it withdrew its request for the indication of provisional measures on behalf of these three individuals, but that its Application remained unchanged. In the Order of 5 February 2003, mentioned in paragraph 3 above, on the request by Mexico for the indication of provisional measures, the Court considered that it was apparent from the information before it that the three Mexican nationals named in the Application who had exhausted all judicial remedies in the United States (see paragraph 20 above) were at risk of execution in the following months, or even weeks. Consequently, it ordered by way of provisional measure that the United States take all measures necessary to ensure that these

individuals would not be executed pending final judgment in these proceedings. The Court notes that, at the date of the present Judgment, these three individuals have not been executed, but further notes with great concern that, by an Order dated 1 March 2004, the Oklahoma Court of Criminal Appeals has set an execution date of 18 May 2004 for Mr. Torres.

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The Mexican objection to the United States objections to jurisdiction and admissibility

22. As noted above, the present dispute has been brought before the Court by Mexico on the basis of the Vienna Convention and the Optional Protocol to that Convention. Article I of the Optional Protocol provides:

> "Disputes arising out of the interpretation or application of the [Vienna] Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by a written application made by any party to the dispute being a Party to the present Protocol."

23. The United States has presented a number of objections to the jurisdiction of the Court, as well as a number of objections to the admissibility of the claims advanced by Mexico. It is however the contention of Mexico that all the objections raised by the United States are inadmissible as having been raised after the expiration of the time-limit laid down by the Rules of Court. Mexico draws attention to the text of Article 79, paragraph 1, of the Rules of Court as amended in 2000, which provides that

> "Any objection by the respondent to the jurisdiction of the Court or to the admissibility of the application, or other objection the decision upon which is requested before any further proceedings on the merits, shall be made in writing as soon as possible, and not later than three months after the delivery of the Memorial."

The previous text of this paragraph required objections to be made "within the time-limit fixed for delivery of the Counter-Memorial". In the present case the Memorial of Mexico was filed on 23 June 2003; the objections of the United States to jurisdiction and admissibility were presented in its Counter-Memorial, filed on 3 November 2003, more than four months later.

24. The United States has observed that, during the proceedings on the request made by Mexico for the indication of provisional measures in this case, it specifically reserved its right to make jurisdictional arguments at the appropriate stage, and that subsequently the Parties agreed that there should be a single round of pleadings. The Court would however emphasize that parties to cases before it cannot, by purporting to "reserve their rights" to take some procedural action, exempt themselves from the application to such action of the provisions of the Statute and Rules of Court (cf. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Order of 13 September 1993, I.C.J. Reports 1993*, p. 338, para. 28).

The Court notes, however, that Article 79 of the Rules applies only to preliminary objections, as is indicated by the title of the subsection of the Rules which it constitutes. As the Court observed in the *Lockerbie* cases, "if it is to be covered by Article 79, an objection must . . . possess a 'preliminary' character," and "Paragraph 1 of Article 79 of the Rules of Court characterizes as 'preliminary' an objection 'the decision upon which is requested before any further proceedings'" (*Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom) (Libyan Arab Jamahiriya v. United States of America), Preliminary Objections, I.C.J. Reports 1998*, p. 26, para. 47; p. 131, para. 46); and the effect of the timely presentation of such an objection is that the proceedings on the merits are suspended (paragraph 5 of Article 79). An objection that is not presented as a preliminary objection in accordance with paragraph 1 of Article 79 does not thereby become inadmissible. There are of course circumstances in which the party failing to put forward an objection to jurisdiction might be held to have acquiesced in jurisdiction (*Appeal Relating to the Jurisdiction of the ICAO Council, Judgment, I.C.J. Reports 1972*, p. 52, para. 13). However, apart from such circumstances, a party failing to avail itself of the Article 79 procedure may forfeit the right to bring about a suspension of the proceedings on the merits, but can still argue the objection along with the merits. That is indeed what the United States has done in this case; and, for reasons to be indicated below, many of its objections are of such a nature that they would in any event probably have had to be heard along with the merits. The Court concludes that it should not exclude from consideration the objections of the United States to jurisdiction and admissibility by reason of the fact that they were not presented within three months from the date of filing of the Memorial.

25. The United States has submitted four objections to the jurisdiction of the Court, and five to the admissibility of the claims of Mexico. As noted above, these have not been submitted as preliminary objections under Article 79 of the Rules of Court; and they are not of such a nature that the Court would be required to examine and dispose of all of them *in limine*, before dealing with any aspect of the merits of the case. Some are expressed to be only addressed to certain claims; some are addressed to questions of the remedies to be indicated if the Court finds that breaches of the Vienna Convention have been committed; and some are of such a nature that they would have to be dealt with along with the merits. The Court will however now examine each of them in turn.

* *

United States objections to jurisdiction

26. The United States contends that the Court lacks jurisdiction to decide many of Mexico's claims, inasmuch as Mexico's submissions in the Memorial asked the Court to decide questions which do not arise out of the interpretation or application of the Vienna Convention, and which the United States has never agreed to submit to the Court.

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27. By its first jurisdictional objection, the United States suggested that the Memorial is fundamentally addressed to the treatment of Mexican nationals in the federal and state criminal justice systems of the United States, and the operation of the United States criminal justice system as a whole. It suggested that Mexico's

invitation to the Court to make what the United States regards as "far-reaching and unsustainable findings concerning the United States criminal justice systems" would be an abuse of the Court's jurisdiction. At the hearings, the United States contended that Mexico is asking the Court to interpret and apply the treaty as if it were intended principally to govern the operation of a State's criminal justice system as it affects foreign nationals.

28. The Court would recall that its jurisdiction in the present case has been invoked under the Vienna Convention and Optional Protocol to determine the nature and extent of the obligations undertaken by the United States towards Mexico by becoming party to that Convention. If and so far as the Court may find that the obligations accepted by the parties to the Vienna Convention included commitments as to the conduct of their municipal courts in relation to the nationals of other parties, then in order to ascertain whether there have been breaches of the Convention, the Court must be able to examine the actions of those courts in the light of international law. The Court is unable to uphold the contention of the United States that, as a matter of jurisdiction, it is debarred from enquiring into the conduct of criminal proceedings in United States courts. How far it may do so in the present case is a matter for the merits. The first objection of the United States to jurisdiction cannot therefore be upheld.

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29. The second jurisdictional objection presented by the United States was addressed to the first of the submissions presented by Mexico in its Memorial (see paragraph 13 above). The United States pointed out that Article 36 of the Vienna Convention "creates no obligations constraining the rights of the United States to arrest a foreign national"; and that similarly the "detaining, trying, convicting and sentencing" of Mexican nationals could not constitute breaches of Article 36, which merely lays down obligations of notification. The United States deduced from this that the matters raised in Mexico's first submission are outside the jurisdiction of the Court under the Vienna Convention and the Optional Protocol, and it maintains this objection in response to the revised submission, presented by Mexico at the hearings, whereby it asks the Court to adjudge and declare:

> "That the United States of America, in arresting, detaining, trying, convicting, and sentencing the 52 Mexican nationals on death row described in Mexico's Memorial, violated its international legal obligations to Mexico, in its own right and in the exercise of its right to diplomatic protection of its nationals, by failing to inform, without delay, the 52 Mexican nationals after their arrest of their right to consular notification and access under Article 36 (1) *(b)* of the Vienna Convention on Consular Relations, and by depriving Mexico of its right to provide consular protection and the 52 nationals' right to receive such protection as Mexico would provide under Article 36 (1) *(a)* and *(c)* of the Convention."

30. This issue is a question of interpretation of the obligations imposed by the Vienna Convention. It is true that the only obligation of the receiving State toward a foreign national that is specifically enunciated by Article 36, paragraph 1 *(b)*, of the Vienna Convention is to inform such foreign national of his rights, when he is

"arrested or committed to prison or to custody pending trial or is detained in any other manner"; the text does not restrain the receiving State from "arresting, detaining, trying, convicting, and sentencing" the foreign national, or limit its power to do so. However, as regards the detention, trial, conviction and sentence of its nationals, Mexico argues that depriving a foreign national facing criminal proceedings of consular notification and assistance renders those proceedings fundamentally unfair. Mexico explains in this respect that:

> "Consular notification constitutes a basic component of due process by ensuring both the procedural equality of a foreign national in the criminal process and the enforcement of other fundamental due process guarantees to which that national is entitled",

and that "It is therefore an essential requirement for fair criminal proceedings against foreign nationals." In Mexico's contention, "consular notification has been widely recognized as a fundamental due process right, and indeed, a human right". On this basis it argues that the rights of the detained Mexican nationals have been violated by the authorities of the United States, and that those nationals have been "subjected to criminal proceedings without the fairness and dignity to which each person is entitled". Consequently, in the contention of Mexico, "the integrity of these proceedings has been hopelessly undermined, their outcomes rendered irrevocably unjust". For Mexico to contend, on this basis, that not merely the failure to notify, but the arrest, detention, trial and conviction of its nationals were unlawful is to argue in favour of a particular interpretation of the Vienna Convention. Such an interpretation may or may not be confirmed on the merits, but is not excluded from the jurisdiction conferred on the Court by the Optional Protocol to the Vienna Convention. The second objection of the United States to jurisdiction cannot therefore be upheld.

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31. The third objection by the United States to the jurisdiction of the Court refers to the first of the submissions in the Mexican Memorial concerning remedies. By that submission, which was confirmed in substance in the final submissions, Mexico claimed that

> "Mexico is entitled to *restitutio in integrum*, and the United States therefore is under an obligation to restore the *status quo ante*, that is, reestablish the situation that existed at the time of the detention and prior to the interrogation of, proceedings against, and convictions and sentences of, Mexico's nationals in violation of the United States' international legal obligations . . ."

On that basis, Mexico went on in its first submission to invite the Court to declare that the United States was bound to vacate the convictions and sentences of the Mexican nationals concerned, to exclude from any subsequent proceedings any statements and confessions obtained from them, to prevent the application of any procedural penalty for failure to raise a timely defence on the basis of the Convention, and to prevent the application of any municipal law rule preventing courts in the United States from providing a remedy for the violation of Article 36 rights.

32. The United States objects that so to require specific acts by the United States in its municipal criminal

justice systems would intrude deeply into the independence of its courts; and that for the Court to declare that the United States is under a specific obligation to vacate convictions and sentences would be beyond its jurisdiction. The Court, the United States claims, has no jurisdiction to review appropriateness of sentences in criminal cases, and even less to determine guilt or innocence, matters which only a court of criminal appeal could go into.

33. For its part, Mexico points out that the United States accepts that the Court has jurisdiction to interpret the Vienna Convention and to determine the appropriate form of reparation under international law. In Mexico's view, these two considerations are sufficient to defeat the third objection to jurisdiction of the United States.

34. For the same reason as in respect of the second jurisdictional objection, the Court is unable to uphold the contention of the United States that, even if the Court were to find that breaches of the Vienna Convention have been committed by the United States of the kind alleged by Mexico, it would still be without jurisdiction to order *restitutio in integrum* as requested by Mexico. The Court would recall in this regard, as it did in the *LaGrand* case, that, where jurisdiction exists over a dispute on a particular matter, no separate basis for jurisdiction is required by the Court in order to consider the remedies a party has requested for the breach of the obligation (*I.C.J. Reports 2001*, p. 485, para. 48). Whether or how far the Court may order the remedy requested by Mexico are matters to be determined as part of the merits of the dispute. The third objection of the United States to jurisdiction cannot therefore be upheld.

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35. The fourth and last jurisdictional objection of the United States is that "the Court lacks jurisdiction to determine whether or not consular notification is a 'human right', or to declare fundamental requirements of substantive or procedural due process". As noted above, it is on the basis of Mexico's contention that the right to consular notification has been widely recognized as a fundamental due process right, and indeed a human right, that it argues that the rights of the detained Mexican nationals have been violated by the authorities of the United States, and that they have been "subjected to criminal proceedings without the fairness and dignity to which each person is entitled". The Court observes that Mexico has presented this argument as being a matter of interpretation of Article 36, paragraph 1 *(b)*, and therefore belonging to the merits. The Court considers that this is indeed a question of interpretation of the Vienna Convention, for which it has jurisdiction; the fourth objection of the United States to jurisdiction cannot therefore be upheld.

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United States objections to admissibility

36. In its Counter-Memorial, the United States has advanced a number of arguments presented as objections to the admissibility of Mexico's claims. It argues that

> "Before proceeding, the Court should weigh whether characteristics of the case before it today, or special circumstances related to particular claims, render either the entire case, or particular claims, inappropriate for further consideration and decision by the Court."

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37. The first objection under this head is that "Mexico's submissions should be found inadmissible because they seek to have this Court function as a court of criminal appeal"; there is, in the view of the United States, "no other apt characterization of Mexico's two submissions in respect of remedies". The Court notes that this contention is addressed solely to the question of remedies. The United States does not contend on this ground that the Court should decline jurisdiction to enquire into the question of breaches of the Vienna Convention at all, but simply that, if such breaches are shown, the Court should do no more than decide that the United States must provide "review and reconsideration" along the lines indicated in the Judgment in the *LaGrand* case (*I.C.J. Reports 2001*, pp. 513-514, para. 125). The Court notes that this is a matter of merits. The first objection of the United States to admissibility cannot therefore be upheld.

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38. The Court now turns to the objection of the United States based on the rule of exhaustion of local remedies. The United States contends that the Court "should find inadmissible Mexico's claim to exercise its right of diplomatic protection on behalf of any Mexican national who has failed to meet the customary legal requirement of exhaustion of municipal remedies". It asserts that in a number of the cases the subject of Mexico's claims, the detained Mexican national, even with the benefit of the provision of Mexican consular assistance, failed to raise the alleged non-compliance with Article 36, paragraph 1, of the Vienna Convention at the trial. Furthermore, it contends that all of the claims relating to cases referred to in the Mexican Memorial are inadmissible because

local remedies remain available in every case. It has drawn attention to the fact that litigation is pending before courts in the United States in a large number of the cases the subject of Mexico's claims and that, in those cases where judicial remedies have been exhausted, the defendants have not had recourse to the clemency process available to them; from this it concludes that none of the cases "is in an appropriate posture for review by an international tribunal".

39. Mexicoresponds that the rule of exhaustion of local remedies cannot preclude the admissibility of its claims. It first states that a majority of the Mexican nationals referred to in paragraph 16 above have sought judicial remedies in the United States based on the Vienna Convention and that their claims have been barred, notably on the basis of the procedural default doctrine. In this regard, it quotes the Court's statement in the *LaGrand* case that "the United States may not . . . rely before this Court on this fact in order to preclude the admissibility of Germany's [claim] . . . , as it was the United States itself which had failed to carry out its obligation under the Convention to inform the LaGrand brothers" (*I.C.J. Reports 2001*, p. 488, para. 60). Further, in respect of the other Mexican nationals, Mexico asserts that

> "the courts of the United States have never granted a judicial remedy to any foreign national for a violation of Article 36. The United States courts hold either that Article 36 does not create an individual right, or that a foreign national who has been denied his Article 36 rights but given his constitutional and statutory rights, cannot establish prejudice and therefore cannot get relief."

It concludes that the available judicial remedies are thus ineffective. As for clemency procedures, Mexico contends that they cannot count for purposes of the rule of exhaustion of local remedies, because they are not a judicial remedy.

40. In its final submissions Mexico asks the Court to adjudge and declare that the United States, in failing to comply with Article 36, paragraph 1, of the Vienna Convention, has "violated its international legal obligations to Mexico, in its own right and in the exercise of its right of diplomatic protection of its nationals".

The Court would first observe that the individual rights of Mexican nationals under subparagraph 1 *(b)* of Article 36 of the Vienna Convention are rights which are to be asserted, at any rate in the first place, within the domestic legal system of the United States. Only when that process is completed and local remedies are exhausted would Mexico be entitled to espouse the individual claims of its nationals through the procedure of diplomatic protection.

In the present case Mexico does not, however, claim to be acting solely on that basis. It also asserts its own claims, basing them on the injury which it contends that *it has itself suffered, directly and through its nationals*, as a result of the violation by the United States of the obligations incumbent upon it under Article 36, paragraph 1 *(a)*, *(b)* and *(c)*.

The Court would recall that, in the *LaGrand* case, it recognized that "Article 36, paragraph 1 [of the Vienna Convention], creates individual rights [for the national concerned], which . . . may be invoked in this Court by the national State of the detained person" (*I.C.J. Reports 2001*, p. 494, para. 77). It would further observe that violations of the rights of the individual under Article 36 may entail a violation of the rights of the sending State, and that violations of the rights of the latter may entail a violation of the rights of the individual. In these special circumstances of interdependence of the rights of the State and of individual rights, Mexico may, in submitting a claim in its own name, request the Court to rule on the violation of rights which it claims to have suffered both directly and through the violation of individual rights conferred on Mexican nationals under Article 36, paragraph 1 *(b)*. The duty to exhaust local remedies does not apply to such a request. Further, for reasons just explained, the Court does not find it necessary to deal with Mexico's claims of violation under a distinct heading of diplomatic protection. Without needing to pronounce at this juncture on the issues raised by the procedural default rule, as explained by Mexico in paragraph 39 above, the Court accordingly finds that the second objection by the United States to admissibility cannot be upheld.

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41. The Court now turns to the question of the alleged dual nationality of certain of the Mexican nationals the subject of Mexico's claims. This question is raised by the United States by way of an objection to the admissibility of those claims: the United States contends that in its Memorial Mexico had failed to establish that it may exercise diplomatic protection based on breaches of Mexico's rights under the Vienna Convention with respect to those of its nationals who are also nationals of the United States. The United States regards it as an accepted principle that, when a person arrested or detained in the receiving State is a national of that State,

then even if he is also a national of another State party to the Vienna Convention, Article 36 has no application, and the authorities of the receiving State are not required to proceed as laid down in that Article; and Mexico has indicated that, for the purposes of the present case it does not contest that dual nationals have no right to be advised of their rights under Article 36.

42. It has however to be recalled that Mexico, in addition to seeking to exercise diplomatic protection of its nationals, is making a claim in its own right on the basis of the alleged breaches by the United States of Article 36 of the Vienna Convention. Seen from this standpoint, the question of dual nationality is not one of admissibility, but of merits. A claim may be made by Mexico of breach of Article 36 of the Vienna Convention in relation to any of its nationals, and the United States is thereupon free to show that, because the person concerned was also a United States national, Article 36 had no application to that person, so that no breach of treaty obligations could have occurred. Furthermore, as regards the claim to exercise diplomatic protection, the question whether Mexico is entitled to protect a person having dual Mexican and United States nationality is subordinated to the question whether, in relation to such a person, the United States was under any obligation in terms of Article 36 of the Vienna Convention. It is thus in the course of its examination of the merits that the Court will have to consider whether the individuals concerned, or some of them, were dual nationals in law. Without prejudice to the outcome of such examination, the third objection of the United States to admissibility cannot therefore be upheld.

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43. The Court now turns to the fourth objection advanced by the United States to the admissibility of Mexico's claims: the contention that "The Court should not permit Mexico to pursue a claim against the United States with respect to any individual case where Mexico had actual knowledge of a breach of the [Vienna Convention] but failed to bring such breach to the attention of the United States or did so only after considerable delay." In the Counter-Memorial, the United States advances two considerations in support of this contention: that if the cases had been mentioned promptly, corrective action might have been possible; and that by inaction Mexico created an impression that it considered that the United States was meeting its obligations under the Convention, as Mexico understood them. At the hearings, the United States suggested that Mexico had in effect waived its right to claim in respect of the alleged breaches of the Convention, and to seek reparation.

44. As the Court observed in the case of *Certain Phosphate Lands in Nauru (Nauru* v. *Australia)*, "delay on the part of a claimant State may render an application inadmissible", but "international law does not lay down any specific time-limit in that regard" (*I.C.J. Reports 1992*, pp. 253-254, para. 32). In that case the Court recognized that delay might prejudice the respondent State "with regard to both the establishment of the facts and the determination of the content of the applicable law" (*ibid.*, p. 255, para. 36), but it has not been suggested that there is any such risk of prejudice in the present case. So far as inadmissibility might be based on an implied waiver of rights, the Court considers that only a much more prolonged and consistent inaction on the part of Mexico than any that the United States has alleged might be interpreted as implying such a waiver. Furthermore, Mexico indicated a number of ways in which

it brought to the attention of the United States the breaches which it perceived of the Vienna Convention. The fourth objection of the United States to admissibility cannot therefore be upheld.

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45. The Court has now to examine the objection of the United States that the claim of Mexico is inadmissible in that Mexico should not be allowed to invoke against the United States standards that Mexico does not follow in its own practice. The United States contends that, in accordance with basic principles of administration of justice and the equality of States, both litigants are to be held accountable to the same rules of international law. The objection in this regard was presented in terms of the interpretation of Article 36 of the Vienna Convention, in the sense that, according to the United States, a treaty may not be interpreted so as to impose a significantly greater burden on any one party than the other (*Diversion of Water from the Meuse, Judgment, 1937, P.C.I.J., Series A/B, No. 70*, p. 20).

46. The Court would recall that the United States had already raised an objection of a similar nature before it in the *LaGrand* case; there, the Court held that it need not decide "whether this argument of the United States, if true, would result in the inadmissibility of Germany's submissions", since the United States had failed to prove that Germany's own practice did not conform to the standards it was demanding from the United States (*I.C.J. Reports 2001*, p. 489, para. 63).

47. The Court would recall that it is in any event essential to have in mind the nature of the Vienna Convention. It lays down certain standards to be observed by all States parties, with a view to the "unimpeded conduct of consular relations", which, as the Court observed in 1979, is important in present-day international law "in promoting the development of friendly relations among nations, and ensuring protection and assistance for aliens resident in the territories of other States" (*United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran), Order of 15 December 1979, I.C.J. Reports 1979*, pp. 19-20, para. 40). Even if it were shown, therefore, that Mexico's practice as regards the application of Article 36 was not beyond reproach, this would not constitute a ground of objection to the admissibility of Mexico's claim. The fifth objection of the United States to admissibility cannot therefore be upheld.

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48. Having established that it has jurisdiction to entertain Mexico's claims and that they are admissible, the Court will now turn to the merits of those claims.

* *

Article 36, paragraph 1

49. In its final submissions Mexico asks the Court to adjudge and declare that,

> "the United States of America, in arresting, detaining, trying, convicting, and sentencing the 52 Mex-

ican nationals on death row described in Mexico's Memorial, violated its international legal obligations to Mexico, in its own right and in the exercise of its right to diplomatic protection of its nationals, by failing to inform, without delay, the 52 Mexican nationals after their arrest of their right to consular notification and access under Article 36 (1) *(b)* of the Vienna Convention on Consular Relations, and by depriving Mexico of its right to provide consular protection and the 52 nationals' right to receive such protection as Mexico would provide under Article 36 (1) *(a)* and *(c)* of the Convention".

50. The Court has already in its Judgment in the *LaGrand* case described Article 36, paragraph 1, as "an interrelated régime designed to facilitate the implementation of the system of consular protection" (*I.C.J. Reports 2001*, p. 492, para. 74). It is thus convenient to set out the entirety of that paragraph.

"With a view toward facilitating the exercise of consular functions relating to nationals of the sending State:

(a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;

(b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph;

(c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action."

51. The United States as the receiving State does not deny its duty to perform these obligations. However, it claims that the obligations apply only to individuals shown to be of Mexican nationality alone, and not to those of dual Mexican/United States nationality. The United States further contends *inter alia* that it has not committed any breach of Article 36, paragraph 1 *(b)*, upon the proper interpretation of "without delay" as used in that subparagraph.

52. Thus two major issues under Article 36, paragraph 1 *(b)*, that are in dispute between the Parties are, first, the question of the nationality of the individuals concerned; and second, the question of the meaning to be given to the expression "without delay". The Court will examine each of these in turn.

53. The Parties have advanced their contentions as to nationality in three different legal contexts. The United

States has begun by making an objection to admissibility, which the Court has already dealt with (see paragraphs 41 and 42 above). The United States has further contended that a substantial number of the 52 persons listed in paragraph 16 above were United States nationals and that it thus had no obligation to these individuals under Article 36, paragraph 1 *(b)*. The Court will address this aspect of the matter in the following paragraphs. Finally, the Parties disagree as to whether the requirement under Article 36, paragraph 1 *(b)*, for the information to be given "without delay" becomes operative upon arrest or upon ascertainment of nationality. The Court will address this issue later (see paragraph 63 below).

54. The Parties disagree as to what each of them must show as regards nationality in connection with the applicability of the terms of Article 36, paragraph 1, and as to how the principles of evidence have been met on the facts of the cases.

55. Both Parties recognize the well-settled principle in international law that a litigant seeking to establish the existence of a fact bears the burden of proving it (cf. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 437, para. 101). Mexico acknowledges that it has the burden of proof to show that the 52 persons listed in paragraph 16 above were Mexican nationals to whom the provisions of Article 36, paragraph 1 *(b)*, in principle apply. It claims it has met this burden by providing to the Court the birth certificates of these nationals, and declarations from 42 of them that they have not acquired U.S. nationality. Mexico further contends that the burden of proof lies on the United States should it wish to contend that particular arrested persons of Mexican nationality were, at the relevant time, also United States nationals.

56. The United States accepts that in such cases it has the burden of proof to demonstrate United States nationality, but contends that nonetheless the "burden of evidence" as to this remains with Mexico. This distinction is explained by the United States as arising out of the fact that persons of Mexican nationality may also have acquired United States citizenship by operation of law, depending on their parents' dates and places of birth, places of residency, marital status at time of their birth and so forth. In the view of the United States "virtually all such information is in the hands of Mexico through the now 52 individuals it represents". The United States contends that it was the responsibility of Mexico to produce such information, which responsibility it has not discharged.

57. The Court finds that it is for Mexico to show that the 52 persons listed in paragraph 16 above held Mexican nationality at the time of their arrest. The Court notes that to this end Mexico has produced birth certificates and declarations of nationality, whose contents have not been challenged by the United States.

The Court observes further that the United States has, however, questioned whether some of these individuals were not also United States nationals. Thus, the United States has informed the Court that, "in the case of defendant Ayala (case No. 2) we are close to certain that Ayala is a United States citizen", and that this could be confirmed with absolute certainty if Mexico produced facts about this matter. Similarly Mr. Avena (case No. 1) was said to be "likely" to be a United States citizen, and there was "some possibility" that some 16 other defendants were United States citizens. As to six others, the United States said it "cannot rule out the possibility" of United States nationality. The Court takes the view that it was for the United States to demonstrate that this was so and to furnish the Court with all information on the matter in its possession. In so far as relevant data on that matter are said by the United States to lie within the knowledge of Mexico, it was for the United States to have sought that information from the Mexican authorities. The Court cannot accept that, because such information may have been in part in the hands of Mexico, it was for Mexico to produce such information. It was for the United States to seek such information, with sufficient specificity, and to demonstrate both that this was done and that the Mexican authorities declined or failed to respond to such specific requests. At no stage, however, has the United States shown the Court that it made specific enquiries of those authorities about particular cases and that responses were not forthcoming. The Court accordingly concludes that the United States has not met its burden of proof in its attempt to show that persons of Mexican nationality were also United States nationals.

The Court therefore finds that, as regards the 52 persons listed in paragraph 16 above, the United States had obligations under Article 36, paragraph 1 *(b)*.

58. Mexico asks the Court to find that

> "the obligation in Article 36, paragraph 1, of the Vienna Convention requires notification of consular rights and a reasonable opportunity for consular access before the competent authorities of the receiving State take any action potentially detrimental to the foreign national's rights".

59. Mexico contends that, in each of the 52 cases before the Court, the United States failed to provide the arrested persons with information as to their rights under Article 36, paragraph 1 *(b)*, "without delay". It alleges that in one case, Mr. Esquivel (case No. 7), the arrested person was informed, but only some 18 months after the arrest, while in another, that of Mr. Juárez (case No. 10), information was given to the arrested person of his rights some 40 hours after arrest. Mexico contends that this still constituted a violation, because "without delay" is to be understood as meaning "immediately", and in any event before any interrogation occurs. Mexico further draws the Court's attention to the fact that in this case a United States court found that there had been a violation of Article 36, paragraph 1 *(b)*, and claims that the United States cannot disavow such a determination by its own courts. In an Annex to its Memorial, Mexico mentions that, in a third case (Mr. Ayala, case No. 2), the accused was informed of his rights upon his arrival on death row, some four years after arrest. Mexico contends that in the remaining cases the Mexicans concerned were in fact never so informed by the United States authorities.

60. The United States disputes both the facts as presented by Mexico and the legal analysis of Article 36, paragraph 1 *(b)*, of the Vienna Convention offered by Mexico. The United States claims that Mr. Solache (case No. 47) was informed of his rights under the Vienna Convention some seven months after his arrest. The United States further claims that many of the persons concerned were of United States nationality and that at least seven of these individuals "appear to have affirmatively claimed to be United States citizens at the time of their arrest". These cases were said to be those of Avena (case No. 1), Ayala (case No. 2), Benavides (case

No. 3), Ochoa (case No. 18), Salcido (case No. 22), Tafoya (case No. 24), and Alvarez (case No. 30). In the view of the United States no duty of consular information arose in these cases. Further, in the contention of the United States, in the cases of Mr. Ayala (case No. 2) and Mr. Salcido (case No. 22) there was no reason to believe that the arrested persons were Mexican nationals at any stage; the information in the case of Mr. Juárez (case No. 10) was given "without delay".

61. The Court thus now turns to the interpretation of Article 36, paragraph 1 *(b)*, having found in paragraph 57 above that it is applicable to the 52 persons listed in paragraph 16. It begins by noting that Article 36, paragraph 1 *(b)*, contains three separate but interrelated elements: the right of the individual concerned to be informed without delay of his rights under Article 36, paragraph 1 *(b)*; the right of the consular post to be notified without delay of the individual's detention, if he so requests; and the obligation of the receiving State to forward without delay any communication addressed to the consular post by the detained person.

62. The third element of Article 36, paragraph 1 *(b)*, has not been raised on the facts before the Court. The Court thus begins with the right of an arrested or detained individual to information.

63. The Court finds that the duty upon the detaining authorities to give the Article 36, paragraph 1 *(b)*, information to the individual arises once it is realized that the person is a foreign national, or once there are grounds to think that the person is probably a foreign national. Precisely when this may occur will vary with circumstances. The United States Department of State booklet, *Consular Notification and Access — Instructions for Federal, State and Local Law Enforcement and Other Officials Regarding Foreign Nationals in the United States and the Rights of Consular Officials to Assist Them*, issued to federal, state and local authorities in order to promote compliance with Article 36 of the Vienna Convention points out in such cases that: "most, but not all, persons born outside the United States are not [citizens]. Unfamiliarity with English may also indicate foreign nationality." The Court notes that when an arrested person himself claims to be of United States nationality, the realization by the authorities that he is not in fact a United States national, or grounds for that realization, is likely to come somewhat later in time.

64. The United States has told the Court that millions of aliens reside, either legally or illegally, on its territory, and moreover that its laws concerning citizenship are generous. The United States has also pointed out that it is a multicultural society, with citizenship being held by persons of diverse appearance, speaking many languages. The Court appreciates that in the United States the language that a person speaks, or his appearance, does not necessarily indicate that he is a foreign national. Nevertheless, and particularly in view of the large numbers of foreign nationals living in the United States, these very circumstances suggest that it would be desirable for enquiry routinely to be made of the individual as to his nationality upon his detention, so that the obligations of the Vienna Convention may be complied with. The United States has informed the Court that some of its law enforcement authorities do routinely ask persons taken into detention whether they are United States citizens. Indeed, were each individual to be told at that time that, should he be a foreign national, he is entitled to ask for his consular post to be contacted, compliance with this requirement under Article 36, paragraph 1 *(b)*, would be greatly enhanced. The provision of

such information could parallel the reading of those rights of which any person taken into custody in connection with a criminal offence must be informed prior to interrogation by virtue of what in the United States is known as the "Miranda rule"; these rights include, *inter alia*, the right to remain silent, the right to have an attorney present during questioning, and the right to have an attorney appointed at government expense if the person cannot afford one. The Court notes that, according to the United States, such a practice in respect of the Vienna Convention rights is already being followed in some local jurisdictions.

65. Bearing in mind the complexities explained by the United States, the Court now begins by examining the application of Article 36, paragraph 1 *(b)*, of the Vienna Convention to the 52 cases. In 45 of these cases, the Court has no evidence that the arrested persons claimed United States nationality, or were reasonably thought to be United States nationals, with specific enquiries being made in timely fashion to verify such dual nationality. The Court has explained in paragraph 57 above what inquiries it would have expected to have been made, within a short time period, and what information should have been provided to the Court.

66. Seven persons, however, are asserted by the United States to have stated at the time of arrest that they were United States citizens. Only in the case of Mr. Salcido (case No. 22) has the Court been provided by the United States with evidence of such a statement. This has been acknowledged by Mexico. Further, there has been no evidence before the Court to suggest that there were in this case at the same time also indications of Mexican nationality, which should have caused rapid enquiry by the arresting authorities and the providing of

consular information "without delay". Mexico has accordingly not shown that in the case of Mr. Salcido the United States violated its obligations under Article 36, paragraph 1 *(b)*.

67. In the case of Mr. Ayala (case No. 2), while he was identified in a court record in 1989 (three years after his arrest) as a United States citizen, there is no evidence to show this Court that the accused did indeed claim upon his arrest to be a United States citizen. The Court has not been informed of any enquiries made by the United States to confirm these assertions of United States nationality.

68. In the five other cases listed by the United States as cases where the individuals "appear to have affirmatively claimed to be United States citizens at the time of their arrest", no evidence has been presented that such a statement was made at the time of arrest.

69. Mr. Avena (case No. 1) is listed in his arrest report as having been born in California. His prison records describe him as of Mexican nationality. The United States has not shown the Court that it was engaged in enquiries to confirm United States nationality.

70. Mr. Benavides (case No. 3) was carrying an Immigration and Naturalization Service immigration card at the time of arrest in 1991. The Court has not been made aware of any reason why the arresting authorities should nonetheless have believed at the time of arrest that he was a United States national. The evidence that his defence counsel in June 1993 informed the court that Mr. Benavides had become a United States citizen is irrelevant to what was understood as to his nationality at time of arrest.

71. So far as Mr. Ochoa is concerned (case No. 18), the Court observes that his arrest report in 1990 refers to him as having been born in Mexico, an assertion that is repeated in a second police report. Some two years later details in his court record refer to him as a United States citizen born in Mexico. The Court is not provided with any further details. The United States has not shown this Court that it was aware of, or was engaged in active enquiry as to, alleged United States nationality at the time of his arrest.

72. Mr. Tafoya (case No. 24) was listed on the police booking sheet as having been born in Mexico. No further information is provided by the United States as to why this was done and what, if any, further enquiries were being made concerning the defendant's nationality.

73. Finally, the last of the seven persons referred to by the United States in this group, Mr. Alvarez (case No. 30), was arrested in Texas on 20 June 1998. Texas records identified him as a United States citizen. Within three days of his arrest, however, the Texas authorities were informed that the Immigration and Naturalization Service was holding investigations to determine whether, because of a previous conviction, Mr. Alvarez was subject to deportation as a foreign national. The Court has not been presented with evidence that rapid resolution was sought as to the question of Mr. Alvarez's nationality.

74. The Court concludes that Mexico has failed to prove the violation by the United States of its obligations under Article 36, paragraph 1 *(b)*, in the case of Mr. Salcido (case No. 22), and his case will not be further commented upon. On the other hand, as regards the other individuals who are alleged to have claimed United States nationality on arrest, whose cases have been considered in paragraphs 67 to 73 above, the argument of the United States cannot be upheld.

75. The question nonetheless remains as to whether, in each of the 45 cases referred to in paragraph 65 and of the six cases mentioned in paragraphs 67 to 73, the United States did provide the required information to the arrested persons "without delay". It is to that question that the Court now turns.

76. The Court has been provided with declarations from a number of the Mexican nationals concerned that attest to their never being informed of their rights under Article 36, paragraph 1 *(b)*. The Court at the outset notes that, in 47 such cases, the United States nowhere challenges this fact of information not being given. Nevertheless, in the case of Mr. Hernández (case No. 34), the United States observes that

> "Although the [arresting] officer did not ask Hernández Llanas whether he wanted them to inform the Mexican Consulate of his arrest, it was certainly not unreasonable for him to assume that an escaped convict would not want the Consulate of the country from which he escaped notified of his arrest."

The Court notes that the clear duty to provide consular information under Article 36, paragraph 1 *(b)*, does not invite assumptions as to what the arrested person might prefer, as a ground for not informing him. It rather gives the arrested person, once informed, the right to say he nonetheless does not wish his consular post to be notified. It necessarily follows that in each of these 47 cases, the duty to inform "without delay" has been violated.

77. In four cases, namely Ayala (case No. 2), Esquivel (case No. 7), Juárez (case No. 10) and Solache (case No. 47), some doubts remain as to whether the information that was given was provided without delay. For these, some examination of the term is thus necessary.

78. This is a matter on which the Parties have very different views. According to Mexico, the timing of the notice to the detained person "is critical to the exercise of the rights provided by Article 36" and the phrase "without delay" in paragraph 1 *(b)* requires "unqualified immediacy". Mexico further contends that, in view of the object and purpose of Article 36, which is to enable "meaningful consular assistance" and the safeguarding of the vulnerability of foreign nationals in custody,

> "consular notification . . . . must occur immediately upon detention and prior to any interrogation of the foreign detainee, so that the consul may offer useful advice about the foreign legal system and provide assistance in obtaining counsel before the foreign national makes any ill-informed decisions or the State takes any action potentially prejudicial to his rights".

79. Thus, in Mexico's view, it would follow that in any case in which a foreign national was interrogated before being informed of his rights under Article 36, there would *ipso facto* be a breach of that Article, however rapidly after the interrogation the information was given to the foreign national. Mexico accordingly includes the case of Mr. Juárez among those where it claims violation of Article 36, paragraph 1 *(b)*, as he was interrogated before being informed of his consular rights, some 40 hours after arrest.

80. Mexico has also invoked the *travaux préparatoires* of the Vienna Convention in support of its interpretation of the requirement that the arrested person be informed "without delay" of the right to ask that the consular post be notified. In particular, Mexico recalled that the phrase proposed to the Conference by the International Law Commission, "without undue delay", was replaced by the United Kingdom proposal to delete the word "undue". The United Kingdom representative had explained that this would avoid the implication that "some delay was permissible" and no delegate had expressed dissent with the USSR and Japanese statements that the result of the amendment would be to require information "immediately".

81. The United States disputed this interpretation of the phrase "without delay". In its view it did not mean "immediately, and before interrogation" and such an understanding was supported neither by the terminology, nor by the object and purpose of the Vienna Convention, nor by its *travaux préparatoires*. In the booklet referred to in paragraph 63 above, the State Department explains that "without delay" means "there should be no deliberate delay" and that the required action should be taken "as soon as reasonably possible under the circumstances". It was normally to be expected that "notification to consular officers" would have been made "within 24 to 72 hours of the arrest or detention". The United States further contended that such an interpretation of the words "without delay" would be reasonable in itself and also allow a consistent interpretation of the phrase as it occurs in each of three different occasions in Article 36, paragraph 1 *(b)*. As for the *travaux préparatoires*, they showed only that undue or deliberate delay had been rejected as unacceptable.

82. According to the United States, the purpose of Article 36 was to facilitate the exercise of consular functions by a consular officer:

> "The significance of giving consular information to a national is thus limited . . . It is a procedural device that allows the foreign national to trigger the related process of notification . . . [It] cannot possibly be fundamental to the criminal justice process."

83. The Court now addresses the question of the proper interpretation of the expression "without delay" in the light of arguments put to it by the Parties. The Court begins by noting that the precise meaning of "without delay", as it is to be understood in Article 36, paragraph 1 *(b)*, is not defined in the Convention. This phrase therefore requires interpretation according to the customary rules of treaty interpretation reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties.

84. Article 1 of the Vienna Convention on Consular Relations, which defines certain of the terms used in the Convention, offers no definition of the phrase "without delay". Moreover, in the different language versions of the Convention various terms are employed to render the phrases "without delay" in Article 36 and "immediately" in Article 14. The Court observes that dictionary definitions, in the various languages of the Vienna Convention, offer diverse meanings of the term "without delay" (and also of "immediately"). It is therefore necessary to look elsewhere for an understanding of this term.

85. As for the object and purpose of the Convention, the Court observes that Article 36 provides for consular

officers to be free to communicate with nationals of the sending State, to have access to them, to visit and speak with them and to arrange for their legal representation. It is not envisaged, either in Article 36, paragraph 1, or elsewhere in the Convention, that consular functions entail a consular officer himself or herself acting as the legal representative or more directly engaging in the criminal justice process. Indeed, this is confirmed by the wording of Article 36, paragraph 2, of the Convention. Thus, neither the terms of the Convention as normally understood, nor its object and purpose, suggest that "without delay" is to be understood as "immediately upon arrest and before interrogation".

86. The Court further notes that, notwithstanding the uncertainties in the *travaux préparatoires*, they too do not support such an interpretation. During the diplomatic conference, the conference's expert, former Special Rapporteur of the International Law Commission, explained to the delegates that the words "without undue delay" had been introduced by the Commission, after long discussion in both the plenary and drafting committee, to allow for special circumstances which might permit information as to consular notification not to be given at once. Germany, the only one of two States to present an amendment, proposed adding "but at latest within one month". There was an extended discussion by many different delegates as to what such outer time-limit would be acceptable. During that debate no delegate proposed "immediately". The shortest specific period suggested was by the United Kingdom, namely "promptly" and no later than "48 hours" afterwards. Eventually, in the absence of agreement on a precise time period, the United Kingdom's other proposal to delete the word "undue" was accepted as the position around which delegates could converge. It is also of interest that there is

no suggestion in the *travaux* that the phrase "without delay" might have different meanings in each of the three sets of circumstances in which it is used in Article 36, paragraph 1 *(b)*.

87. The Court thus finds that "without delay" is not necessarily to be interpreted as "immediately" upon arrest. It further observes that during the Conference debates on this term, no delegate made any connection with the issue of interrogation. The Court considers that the provision in Article 36, paragraph 1 *(b)*, that the receiving State authorities "shall inform the person concerned without delay of his rights" cannot be interpreted to signify that the provision of such information must necessarily precede any interrogation, so that the commencement of interrogation before the information is given would be a breach of Article 36.

88. Although, by application of the usual rules of interpretation, "without delay" as regards the duty to inform an individual under Article 36, paragraph 1 *(b)*, is not to be understood as necessarily meaning "immediately upon arrest", there is nonetheless a duty upon the arresting authorities to give that information to an arrested person as soon as it is realized that the person is a foreign national, or once there are grounds to think that the person is probably a foreign national.

89. With one exception, no information as to entitlement to consular notification was given in any of the cases cited in paragraph 77 within any of the various time periods suggested by the delegates to the Conference on the Vienna Convention, or by the United States itself (see paragraphs 81 and 86 above). Indeed, the information was given either not at all or at periods very significantly removed from the time of arrest. In the case of Mr. Juárez (case No. 10), the defendant was informed of his consular rights 40 hours after his arrest. The Court notes, however, that Mr. Juárez's arrest report stated that he had been born in Mexico; moreover, there had been indications of his Mexican nationality from the time of his initial interrogation by agents of the Federal Bureau of Investigation (FBI) following his arrest. It follows that Mr. Juárez's Mexican nationality was apparent from the outset of his detention by the United States authorities. In these circumstances, in accordance with its interpretation of the expression "without delay" (see paragraph 88 above), the Court concludes that the United States violated the obligation incumbent upon it under Article 36, paragraph 1 *(b)*, to inform Mr. Juárez without delay of his consular rights. The Court notes that the same finding was reached by a California Superior Court, albeit on different grounds.

90. The Court accordingly concludes that, with respect to each of the individuals listed in paragraph 16, with the exception of Mr. Salcido (case No. 22; see paragraph 74 above), the United States has violated its obligation under Article 36, paragraph 1 *(b)*, of the Vienna Convention to provide information to the arrested person.

91. As noted above, Article 36, paragraph 1 *(b)*, contains three elements. Thus far, the Court has been dealing with the right of an arrested person to be informed that he may ask for his consular post to be notified. The Court now turns to another aspect of Article 36, paragraph 1 *(b)*. The Court finds the United States is correct in observing that the fact that a Mexican consular post was not notified under Article 36, paragraph 1 *(b)*, does not of necessity show that the arrested person was not informed of his rights under that provision. He may have been informed and declined to have his consular post notified. The giving of the information is relevant, how-

ever, for satisfying the element in Article 36, paragraph 1 *(b)*, on which the other two elements therein depend.

92. In only two cases has the United States claimed that the arrested person was informed of his consular rights but asked for the consular post not to be notified. These are Mr. Juárez (case No. 10) and Mr. Solache (case No. 47).

93. The Court is satisfied that when Mr. Juárez (case No. 10) was informed of his consular rights 40 hours after his arrest (see paragraph 89) he chose not to have his consular post notified. As regards Mr. Solache (case No. 47), however, it is not sufficiently clear to the Court, on the evidence before it, that he requested that his consular post should not be notified. Indeed, the Court has not been provided with any reasons as to why, if a request of non-notification was made, the consular post was then notified some three months later.

94. In a further three cases, the United States alleges that the consular post was formally notified of the detention of one of its Mexican nationals without prior information to the individual as to his consular rights. These are Mr. Covarrubias (case No. 6), Mr. Hernández (case No. 34) and Mr. Reyes (case No. 54). The United States further contends that the Mexican authorities were contacted regarding the case of Mr. Loza (case No. 52).

95. The Court notes that, in the case of Mr. Covarrubias (case No. 6), the consular authorities learned from third parties of his arrest shortly after it occurred. Some 16 months later, a court-appointed interpreter requested that the consulate intervene in the case prior to trial. It would appear doubtful whether an interpreter can be considered a competent authority for triggering the interrelated provisions of Article 36, paragraph 1 *(b)*, of the

Vienna Convention. In the case of Mr. Reyes (case No. 34), the United States has simply told the Court that an Oregon Department of Justice attorney had advised United States authorities that both the District Attorney and the arresting detective advised the Mexican consular authorities of his arrest. No information is given as to when this occurred, in relation to the date of his arrest. Mr. Reyes did receive assistance before his trial. In these two cases, the Court considers that, even on the hypothesis that the conduct of the United States had no serious consequences for the individuals concerned, it did nonetheless constitute a violation of the obligations incumbent upon the United States under Article 36, paragraph 1 *(b)*.

96. In the case of Mr. Loza (case No. 52), a United States Congressman from Ohio contacted the Mexican Embassy on behalf of Ohio prosecutors, some four months after the accused's arrest, "to enquire about the procedures for obtaining a certified copy of Loza's birth certificate". The Court has not been provided with a copy of the Congressman's letter and is therefore unable to ascertain whether it explained that Mr. Loza had been arrested. The response from the Embassy (which is also not included in the documentation provided to the Court) was passed by the Congressman to the prosecuting attorney, who then asked the Civil Registry of Guadalajara for a copy of the birth certificate. This request made no specific mention of Mr. Loza's arrest. Mexico contends that its consulate was never formally notified of Mr. Loza's arrest, of which it only became aware after he had been convicted and sentenced to death. Mexico includes the case of Mr. Loza among those in which the United States was in breach of its obligation of consular notification. Taking account of all these elements, and in particular of the fact that the Embassy was contacted

four months after the arrest, and that the consular post became aware of the defendant's detention only after he had been convicted and sentenced, the Court concludes that in the case of Mr. Loza the United States violated the obligation of consular notification without delay incumbent upon it under Article 36, paragraph 1 *(b)*.

97. Mr. Hernández (case No. 34) was arrested in Texas on Wednesday 15 October 1997. The United States authorities had no reason to believe he might have American citizenship. The consular post was notified the following Monday, that is five days (corresponding to only three working days) thereafter. The Court finds that, in the circumstances, the United States did notify the consular post without delay, in accordance with its obligation under Article 36, paragraph 1 *(b)*.

98. In the first of its final submissions, Mexico also asks the Court to find that the violations it ascribes to the United States in respect of Article 36, paragraph 1 *(b)*, have also deprived "Mexico of its right to provide consular protection and the 52 nationals' right to receive such protection as Mexico would provide under Article 36 (1) *(a)* and *(c)* of the Convention".

99. The relationship between the three subparagraphs of Article 36, paragraph 1, has been described by the Court in its Judgment in the *LaGrand* case (*I.C.J. Judgments 2001*, p. 492, para. 74) as "an interrelated régime". The legal conclusions to be drawn from that interrelationship necessarily depend upon the facts of each case. In the *LaGrand* case, the Court found that the failure for 16 years to inform the brothers of their right to have their consul notified effectively prevented the exercise of other rights that Germany might have chosen to exercise under subparagraphs *(a)* and *(c)*.

100. It is necessary to revisit the interrelationship of the three subparagraphs of Article 36, paragraph 1, in the light of the particular facts and circumstances of the present case.

101. The Court would first recall that, in the case of Mr. Juárez (case No. 10) (see paragraph 93 above), when the defendant was informed of his rights, he declined to have his consular post notified. Thus in this case there was no violation of either subparagraph *(a)* or subparagraph *(c)* of Article 36, paragraph 1.

102. In the remaining cases, because of the failure of the United States to act in conformity with Article 36, paragraph 1 *(b)*, Mexico was in effect precluded (in some cases totally, and in some cases for prolonged periods of time) from exercising its right under paragraph 1 *(a)* to communicate with its nationals and have access to them. As the Court has already had occasion to explain, it is immaterial whether Mexico would have offered consular assistance, "or whether a different verdict would have been rendered. It is sufficient that the Convention conferred these rights" (*I.C.J. Reports 2001*, p. 492, para. 74), which might have been acted upon.

103. The same is true, *pari passu*, of certain rights identified in subparagraph *(c)*: "consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, and to converse and correspond with him . . ."

104. On the other hand, and on the particular facts of this case, no such generalized answer can be given as regards a further entitlement mentioned in subparagraph *(c)*, namely, the right of consular officers "to arrange for [the] legal representation" of the foreign national. Mexico has laid much emphasis in this litigation upon the

importance of consular officers being able to arrange for such representation before and during trial, and especially at sentencing, in cases in which a severe penalty may be imposed. Mexico has further indicated the importance of any financial or other assistance that consular officers may provide to defence counsel, *inter alia* for investigation of the defendant's family background and mental condition, when such information is relevant to the case. The Court observes that the exercise of the rights of the sending State under Article 36, paragraph 1 *(c)*, depends upon notification by the authorities of the receiving State. It may be, however, that information drawn to the attention of the sending State by other means may still enable its consular officers to assist in arranging legal representation for its national. In the following cases, the Mexican consular authorities learned of their national's detention in time to provide such assistance, either through notification by United States authorities (albeit belatedly in terms of Article 36, paragraph 1 *(b)*) or through other channels: Benavides (case No. 3); Covarrubias (case No. 6); Esquivel (case No. 7); Hoyos (case No. 9); Mendoza (case No. 17); Ramírez (case No. 20); Sánchez (case No. 23); Verano (case No. 27); Zamudio (case No. 29); Gómez (case No. 33); Hernández (case No. 34); Ramírez (case No. 41); Rocha (case No. 42); Solache (case No. 47); Camargo (case No. 49) and Reyes (case No. 54).

105. In relation to Mr. Manríquez (case No. 14), the Court lacks precise information as to when his consular post was notified. It is merely given to understand that it was two years prior to conviction, and that Mr. Manríquez himself had never been informed of his consular rights. There is also divergence between the Parties in regard to the case of Mr. Fuentes (case No. 15), where Mexico claims it became aware of his detention during trial and the United States says this occurred during jury selection, prior to the actual commencement of the trial. In the case of Mr. Arias (case No. 44), the Mexican authorities became aware of his detention less than one week before the commencement of the trial. In those three cases, the Court concludes that the United States violated its obligations under Article 36, paragraph 1 *(c)*.

106. On this aspect of the case, the Court thus concludes:

(1) that the United States committed breaches of the obligation incumbent upon it under Article 36, paragraph 1 *(b)*, of the Vienna Convention to inform detained Mexican nationals of their rights under that paragraph, in the case of the following 51 individuals: Avena (case No. 1), Ayala (case No. 2), Benavides (case No. 3), Carrera (case No. 4), Contreras (case No. 5), Covarrubias (case No. 6), Esquivel (case No. 7), Gómez (case No. 8), Hoyos (case No. 9), Juárez (case No. 10), López (case No. 11), Lupercio (case No. 12), Maciel (case No. 13), Manríquez (case No. 14), Fuentes (case No. 15), Martínez (case No. 16), Mendoza (case No. 17), Ochoa (case No. 18), Parra (case No. 19), Ramírez (case No. 20), Salazar (case No. 21), Sánchez (case No. 23), Tafoya (case No. 24), Valdez (case No. 25), Vargas (case No. 26), Verano (case No. 27), Zamudio (case No. 29), Alvarez (case No. 30), Fierro (case No. 31), García (case No. 32), Gómez (case No. 33), Hernández (case No. 34), Ibarra (case No. 35), Leal (case No. 36), Maldonado (case No. 37), Medellín (case No. 38), Moreno (case No. 39), Plata (case No. 40), Ramírez (case No. 41), Rocha (case No. 42), Regalado (case No. 43), Arias

(case No. 44), Caballero (case No. 45), Flores (case No. 46), Solache (case No. 47), Fong (case No. 48), Camargo (case No. 49), Pérez (case No. 51), Loza (case No. 52), Torres (case No. 53) and Reyes (case No. 54);

(2) that the United States committed breaches of the obligation incumbent upon it under Article 36, paragraph 1 *(b)* to notify the Mexican consular post of the detention of the Mexican nationals listed in subparagraph (1) above, except in the cases of Mr. Juárez (No. 10) and Mr. Hernández (No. 34);

(3) that by virtue of its breaches of Article 36, paragraph 1 *(b)*, as described in subparagraph (2) above, the United States also violated the obligation incumbent upon it under Article 36, paragraph 1 *(a)*, of the Vienna Convention to enable Mexican consular officers to communicate with and have access to their nationals, as well as its obligation under paragraph 1 *(c)* of that Article regarding the right of consular officers to visit their detained nationals;

(4) that the United States, by virtue of these breaches of Article 36, paragraph 1 *(b)*, also violated the obligation incumbent upon it under paragraph 1 *(c)* of that Article to enable Mexican consular officers to arrange for legal representation of their nationals in the case of the following individuals: Avena (case No. 1), Ayala (case No. 2), Carrera (case No. 4), Contreras (case No. 5), Gómez (case No. 8), López (case No. 11), Lupercio (case No. 12), Maciel (case No. 13), Manríquez (case No. 14), Fuentes (case No. 15), Martínez (case No. 16), Ochoa (case No. 18), Parra (case No. 19),

Salazar (case No. 21), Tafoya (case No. 24), Valdez (case No. 25), Vargas (case No. 26), Alvarez (case No. 30), Fierro (case No. 31), García (case No. 32), Ibarra (case No. 35), Leal (case No. 36), Maldonado (case No. 37), Medellín (case No. 38), Moreno (case No. 39), Plata (case No. 40), Regalado (case No. 43), Arias (case No. 44), Caballero (case No. 45), Flores (case No. 46), Fong (case No. 48), Pérez (case No. 51), Loza (case No. 52) and Torres (case No. 53).

*

Article 36, paragraph 2

107. In its third final submission Mexico asks the Court to adjudge and declare that "the United States violated its obligations under Article 36 (2) of the Vienna Convention by failing to provide meaningful and effective review and reconsideration of convictions and sentences impaired by a violation of Article 36 (1)".

108. Article 36, paragraph 2, provides:

> "The rights referred to in paragraph 1 of this article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this article are intended."

109. In this connection, Mexico has argued that the United States

> "By applying provisions of its municipal law to defeat or foreclose remedies for the violation of

> rights conferred by Article 36 — thus failing to provide meaningful review and reconsideration of severe sentences imposed in proceedings that violated Article 36 — . . . has violated, and continues to violate, the Vienna Convention."

More specifically, Mexico contends that:

> "The United States uses several municipal legal doctrines to prevent finding any legal effect from the violations of Article 36. *First*, despite this Court's clear analysis in *LaGrand*, U.S. courts, at both the state and federal level, continue to invoke default doctrines to bar any review of Article 36 violations — even when the national had been unaware of his rights to consular notification and communication and thus his ability to raise their violation as an issue at trial, due to the competent authorities' failure to comply with Article 36."

110. Against this contention by Mexico, the United States argues that:

> "the criminal justice systems of the United States address all errors in process through both judicial and executive clemency proceedings, relying upon the latter when rules of default have closed out the possibility of the former. That is, the 'laws and regulations' of the United States provide for the correction of mistakes that may be relevant to a criminal defendant to occur through a combination of judicial review and clemency. These processes together, working with other competent authorities, give full effect to the purposes for which Article 36 (1) is intended, in conformity with Article 36 (2). And, insofar as a breach of Article 36 (1) has occurred, these procedures satisfy the remedial function of Article 36 (2) by allowing the United States to provide review and reconsideration of convictions and sentences consistent with *LaGrand*."

111. The "procedural default" rule in United States law has already been brought to the attention of the Court in the *LaGrand* case. The following brief definition of the rule was provided by Mexico in its Memorial in this case and has not been challenged by the United States: "a defendant who could have raised, but fails to raise, a legal issue at trial will generally not be permitted to raise it in future proceedings, on appeal or in a petition for a writ of *habeas corpus*". The rule requires exhaustion of remedies, *inter alia*, at the state level and before a *habeas corpus* motion can be filed with federal courts. In the *LaGrand* case, the rule in question was applied by United States federal courts; in the present case, Mexico also complains of the application of the rule in certain state courts of criminal appeal.

112. The Court has already considered the application of the "procedural default" rule, alleged by Mexico to be a hindrance to the full implementation of the international obligations of the United States under Article 36, in the *LaGrand* case, when the Court addressed the issue of its implications for the application of Article 36, paragraph 2, of the Vienna Convention. The Court emphasized that "a distinction must be drawn between that rule as such and its specific application in the present case". The Court stated:

> "In itself, the rule does not violate Article 36 of the Vienna Convention. The problem arises when the procedural default rule does not allow the detained individual to challenge a conviction and

> sentence by claiming, in reliance on Article 36, paragraph 1, of the Convention, that the competent national authorities failed to comply with their obligation to provide the requisite consular information 'without delay', thus preventing the person from seeking and obtaining consular assistance from the sending State." (*I.C.J. Reports 2001*, p. 497, para. 90.)

On this basis, the Court concluded that "the procedural default rule prevented counsel for the LaGrands to effectively challenge their convictions and sentences other than on United States constitutional grounds" (*ibid.*, para. 91). This statement of the Court seems equally valid in relation to the present case, where a number of Mexican nationals have been placed exactly in such a situation.

113. The Court will return to this aspect below, in the context of Mexico's claims as to remedies. For the moment, the Court simply notes that the procedural default rule has not been revised, nor has any provision been made to prevent its application in cases where it has been the failure of the United States itself to inform that may have precluded counsel from being in a position to have raised the question of a violation of the Vienna Convention in the initial trial. It thus remains the case that the procedural default rule may continue to prevent courts from attaching legal significance to the fact, *inter alia*, that the violation of the rights set forth in Article 36, paragraph 1, prevented Mexico, in a timely fashion, from retaining private counsel for certain nationals and otherwise assisting in their defence. In such cases, application of the procedural default rule would have the effect of preventing "full effect [from being] given to the purposes for which the rights

accorded under this article are intended", and thus violate paragraph 2 of Article 36. The Court notes moreover that in several of the cases cited in Mexico's final submissions the procedural default rule has already been applied, and that in others it could be applied at subsequent stages in the proceedings. However, in none of the cases, save for the three mentioned in paragraph 114 below, have the criminal proceedings against the Mexican nationals concerned already reached a stage at which there is no further possibility of judicial re-examination of those cases; that is to say, all possibility is not yet excluded of "review and reconsideration" of conviction and sentence, as called for in the *LaGrand* case, and as explained further in paragraphs 128 and following below. It would therefore be premature for the Court to conclude at this stage that, in those cases, there is already a violation of the obligations under Article 36, paragraph 2, of the Vienna Convention.

114. By contrast, the Court notes that in the case of three Mexican nationals, Mr. Fierro (case No. 31), Mr. Moreno (case No. 39), and Mr. Torres (case No. 53), conviction and sentence have become final. Moreover, in the case of Mr. Torres the Oklahoma Court of Criminal Appeals has set an execution date (see paragraph 21 above, *in fine*). The Court must therefore conclude that, in relation to these three individuals, the United States is in breach of the obligations incumbent upon it under Article 36, paragraph 2, of the Vienna Convention.

* *

Legal consequences of the breach

115. Having concluded that in most of the cases brought before the Court by Mexico in the 52 instances, there has been a failure to observe the obligations prescribed by Article 36, paragraph 1 *(b)*, of the Vienna Convention, the Court now proceeds to the examination of the legal consequences of such a breach and of what legal remedies should be considered for the breach.

116. Mexico in its fourth, fifth and sixth submissions asks the Court to adjudge and declare:

> "(4) that pursuant to the injuries suffered by Mexico in its own right and in the exercise of diplomatic protection of its nationals, Mexico is entitled to full reparation for these injuries in the form of *restitutio in integrum*;
>
> (5) that this restitution consists of the obligation to restore the *status quo ante* by annulling or otherwise depriving of full force or effect the conviction and sentences of all 52 Mexican nationals; [and]
>
> (6) that this restitution also includes the obligation to take all measures necessary to ensure that a prior violation of Article 36 shall not affect the subsequent proceedings."

117. In support of its fourth and fifth submissions, Mexico argues that "It is well-established that the primary form of reparation available to a State injured by an internationally wrongful act is *restitutio in integrum*", and that "The United States is therefore obliged to take the necessary action to restore the *status quo ante* in respect of Mexico's nationals detained, tried, convicted and sentenced in violation of their internationally recognized rights". To restore the *status quo ante*, Mexico contends that "restitution here must take the form of annulment of the convictions and sentences that resulted from the proceedings tainted by the Article 36 violations", and that "It follows from the very nature of *restitutio* that, when a violation of an international obligation is manifested in a judicial act, that act must be annulled and thereby deprived of any force or effect in the national legal system". Mexico therefore asks in its submissions that the convictions and sentences of the 52 Mexican nationals be annulled, and that, in any future criminal proceedings against these 52 Mexican nationals, evidence obtained in breach of Article 36 of the Vienna Convention be excluded.

118. The United States on the other hand argues:

> "*LaGrand*'s holding calls for the United States to provide, in each case, 'review and reconsideration' that 'takes account of' the violation, not 'review and reversal', not across-the-board exclusions of evidence or nullification of convictions simply because a breach of Article 36 (1) occurred and without regard to its effect upon the conviction and sentence and, not . . . 'a precise, concrete, stated result: to re-establish the *status quo ante*'".

119. The general principle on the legal consequences of the commission of an internationally wrongful act was stated by the Permanent Court of International Justice in the *Factory at Chorzów* case as follows: "It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form." (*Factory at Chorzów, Jurisdiction, 1927, P.C.I.J., Series A, No. 9*, p. 21.) What constitutes "reparation in an adequate form" clearly varies depending upon the

concrete circumstances surrounding each case and the precise nature and scope of the injury, since the question has to be examined from the viewpoint of what is the "reparation in an adequate form" that corresponds to the injury. In a subsequent phase of the same case, the Permanent Court went on to elaborate on this point as follows:

> "The essential principle contained in the actual notion of an illegal act — a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals — is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed." (*Factory at Chorzów, Merits, 1928, P.C.I.J., Series A, No. 17*, p. 47.)

120. In the *LaGrand* case the Court made a general statement on the principle involved as follows:

> "The Court considers in this respect that if the United States, notwithstanding its commitment [to ensure implementation of the specific measures adopted in performance of its obligations under Article 36, paragraph 1 *(b)*], should fail in its obligation of consular notification to the detriment of German nationals, an apology would not suffice in cases where the individuals concerned have been subjected to prolonged detention or convicted and sentenced to severe penalties. In the case of such a conviction and sentence, it would be incumbent upon the United States to allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in the Convention. This obligation can be carried out in various ways. The choice of means must be left to the United States." (*I.C.J. Reports 2001*, pp. 513-514, para. 125.)

121. Similarly, in the present case the Court's task is to determine what would be adequate reparation for the violations of Article 36. It should be clear from what has been observed above that the internationally wrongful acts committed by the United States were the failure of its competent authorities to inform the Mexican nationals concerned, to notify Mexican consular posts and to enable Mexico to provide consular assistance. It follows that the remedy to make good these violations should consist in an obligation on the United States to permit review and reconsideration of these nationals' cases by the United States courts, as the Court will explain further in paragraphs 128 to 134 below, with a view to ascertaining whether in each case the violation of Article 36 committed by the competent authorities caused actual prejudice to the defendant in the process of administration of criminal justice.

122. The Court reaffirms that the case before it concerns Article 36 of the Vienna Convention and not the correctness as such of any conviction or sentencing. The question of whether the violations of Article 36, paragraph 1, are to be regarded as having, in the causal sequence of events, ultimately led to convictions and severe penalties is an integral part of criminal proceedings before the courts of the United States and is for them to determine in the process of review and reconsideration. In so doing, it is for the courts of the United States to examine the facts, and in particular the prejudice and its causes, taking account of the violation of the rights set forth in the Convention.

123. It is not to be presumed, as Mexico asserts, that partial or total annulment of conviction or sentence provides the necessary and sole remedy. In this regard, Mexico cites the recent Judgment of this Court in the case concerning the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, in which the "Court ordered the cancellation of an arrest warrant issued by a Belgian judicial official in violation of the international immunity of the Congo Minister for Foreign Affairs". However, the present case has clearly to be distinguished from the *Arrest Warrant* case. In that case, the question of the legality under international law of the act of issuing the arrest warrant against the Congolese Minister for Foreign Affairs by the Belgian judicial authorities was itself the subject-matter of the dispute. Since the Court found that act to be in violation of international law relating to immunity, the proper legal consequence was for the Court to order the cancellation of the arrest warrant in question (*I.C.J. Reports 2002*, p. 33). By contrast, in the present case it is not the convictions and sentences of the Mexican nationals which are to be regarded as a violation of international law, but solely certain breaches of treaty obligations which preceded them.

124. Mexico has further contended that the right to consular notification and consular communication under the Vienna Convention is a fundamental human right that constitutes part of due process in criminal proceedings and should be guaranteed in the territory of each of the Contracting Parties to the Vienna Convention; according to Mexico, this right, as such, is so fundamental that its infringement will *ipso facto* produce the effect of vitiating the entire process of the criminal proceedings conducted in violation of this fundamental right. Whether or not the Vienna Convention rights are human rights is not a matter that this Court need decide. The Court would, however, observe that neither the text nor the object and purpose of the Convention, nor any indication in the *travaux préparatoires*, support the conclusion that Mexico draws from its contention in that regard.

125. For these reasons, Mexico's fourth and fifth submissions cannot be upheld.

126. The reasoning of the Court on the fifth submission of Mexico is equally valid in relation to the sixth submission of Mexico. In elaboration of its sixth submission, Mexico contends that "As an aspect of *restitutio in integrum*, Mexico is also entitled to an order that in any subsequent criminal proceedings against the nationals, statements and confessions obtained prior to notification to the national of his right to consular assistance be excluded". Mexico argues that "The exclusionary rule applies in both common law and civil law jurisdictions and requires the exclusion of evidence that is obtained in a manner that violates due process obligations", and on this basis concludes that

> "The status of the exclusionary rule as a general principle of law permits the Court to order that the United States is obligated to apply this principle in respect of statements and confessions given to United States law enforcement officials prior to the accused Mexican nationals being advised of their consular rights in any subsequent criminal proceedings against them."

127. The Court does not consider that it is necessary to enter into an examination of the merits of the contention advanced by Mexico that the "exclusionary rule" is "a general principle of law under Article 38(1) (c) of the . . . Statute" of the Court. The issue raised by Mex-

ico in its sixth submission relates to the question of what legal consequences flow from the breach of the obligations under Article 36, paragraph 1 — a question which the Court has already sufficiently discussed above in relation to the fourth and the fifth submissons of Mexico. The Court is of the view that this question is one which has to be examined under the concrete circumstances of each case by the United States courts concerned in the process of their review and reconsideration. For this reason, the sixth submission of Mexico cannot be upheld.

128. While the Court has rejected the fourth, fifth and sixth submissions of Mexico relating to the remedies for the breaches by the United States of its international obligations under Article 36 of the Vienna Convention, the fact remains that such breaches have been committed, as the Court has found, and it is thus incumbent upon the Court to specify what remedies are required in order to redress the injury done to Mexico and to its nationals by the United States through non-compliance with those international obligations. As has already been observed in paragraph 120, the Court in the *LaGrand* Judgment stated the general principle to be applied in such cases by way of a remedy to redress an injury of this kind (*I.C.J. Reports 2001*, pp. 513-514, para. 125).

129. In this regard, Mexico's seventh submission also asks the Court to adjudge and declare:

> "That to the extent that any of the 52 convictions or sentences are not annulled, the United States shall provide, by means of its own choosing, meaningful and effective review and reconsideration of the convictions and sentences of the 52 nationals, and that this obligation cannot be satisfied by means of clemency proceedings or if any municipal law rule or doctrine [that fails to attach legal significance to an Article 36 (1) violation] is applied."

130. On this question of "review and reconsideration", the United States takes the position that it has indeed conformed its conduct to the *LaGrand* Judgment. In a further elaboration of this point, the United States argues that "[t]he Court said in *LaGrand* that the choice of means for allowing the review and reconsideration it called for 'must be left' to the United States", but that "Mexico would not leave this choice to the United States but have the Court undertake the review instead and decide at once that the breach requires the conviction and sentence to be set aside in each case".

131. In stating in its Judgment in the *LaGrand* case that "the United States of America, *by means of its own choosing*, shall allow the review and reconsideration of the conviction and sentence" (*I.C.J. Reports 2001*, p. 516, para. 128; emphasis added), the Court acknowledged that the concrete modalities for such review and reconsideration should be left primarily to the United States. It should be underlined, however, that this freedom in the choice of means for such review and reconsideration is not without qualification: as the passage of the Judgment quoted above makes abundantly clear, such review and reconsideration has to be carried out "by taking account of the violation of the rights set forth in the Convention" (*I.C.J. Reports 2001*, p. 514, para. 125), including, in particular, the question of the legal consequences of the violation upon the criminal proceedings that have followed the violation.

132. The United States argues (1) "that the Court's decision in *LaGrand* in calling for review and reconsideration called for a process to re-examine a convic-

tion and sentence in light of a breach of Article 36"; (2) that "in calling for a process of review, the Court necessarily implied that one legitimate result of that process might be a conclusion that the conviction and sentence should stand"; and (3) "that the relief Mexico seeks in this case is flatly inconsistent with the Judgment in *LaGrand*: it seeks precisely the award of a substantive outcome that the *LaGrand* Court declined to provide".

133. However, the Court wishes to point out that the current situation in the United States criminal procedure, as explained by the Agent at the hearings, is that "If the defendant alleged at trial that *a failure of consular information resulted in harm to a particular right essential to a fair trial*, an appeals court can *review how the lower court handled that claim of prejudice*", but that "*If the foreign national did not raise his Article 36 claim at trial, he may face procedural constraints* [i.e., the application of the procedural default rule] on raising that particular claim in direct or collateral judicial appeals" (emphasis added). As a result, a claim based on the violation of Article 36, paragraph 1, of the Vienna Convention, however meritorious in itself, could be barred in the courts of the United States by the operation of the procedural default rule (see paragraph 111 above).

134. It is not sufficient for the United States to argue that "[w]hatever label [the Mexican defendant] places on his claim, his right . . . must and will be vindicated if it is raised *in some form* at trial" (emphasis added), and that

> "In that way, even though a failure to label the complaint as a breach of the Vienna Convention may mean that he has technically speaking forfeited his right to raise this issue as a Vienna Convention claim, on appeal that failure would not bar him from independently asserting *a claim that he was prejudiced because he lacked this critical protection needed for a fair trial*." (Emphasis added.)

The crucial point in this situation is that, by the operation of the procedural default rule as it is applied at present, the defendant is effectively barred from raising the issue of the violation of his rights under Article 36 of the Vienna Convention and is limited to seeking the vindication of his rights under the United States Constitution.

*

135. Mexico, in the latter part of its seventh submission, has stated that "this obligation [of providing review and reconsideration] cannot be satisfied by means of clemency proceedings". Mexico elaborates this point by arguing first of all that "the United States's reliance on clemency proceedings is wholly inconsistent with its obligation to provide a remedy, as that obligation was found by this Court in *LaGrand*". More specifically, Mexico contends:

> "*First*, it is clear that the Court's direction to the United States in *LaGrand* clearly contemplated that 'review and reconsideration' would be carried out by judicial procedures . . .
>
> *Second*, the Court was fully aware that the LaGrand brothers had received a clemency hearing, during which the Arizona Pardons Board took into account the violation of their consular rights. Accordingly, the Court determined in *LaGrand* that clemency review alone did not constitute the required 'review and reconsideration' . . .

> *Finally*, the Court specified that the United States must 'allow the review and reconsideration of the *conviction and sentence* by taking account of the violation of the rights set forth in the Convention' . . . it is a basic matter of U.S. criminal procedural law that courts review convictions; clemency panels do not. With the rare exception of pardons based on actual innocence, the focus of capital clemency review is on the propriety of the sentence and not on the underlying conviction."

Furthermore, Mexico argues that the clemency process is in itself an ineffective remedy to satisfy the international obligations of the United States. It concludes: "clemency review is standardless, secretive, and immune from judicial oversight".

Finally, in support of its contention, Mexico argues that

> "the failure of state clemency authorities to pay heed to the intervention of the U.S. Department of State in cases of death-sentenced Mexican nationals refutes the [United States] contention that clemency review will provide meaningful consideration of the violations of rights conferred under Article 36".

136. Against this contention of Mexico, the United States claims that it "gives 'full effect' to the 'purposes for which the rights accorded under [Article 36, paragraph 1,] are intended' through executive clemency". It argues that "[t]he clemency process . . . is well suited to the task of providing review and reconsideration". The United States explains that "Clemency . . . is more than a matter of grace; it is part of the overall scheme for ensuring justice and fairness in the legal process" and

that "Clemency procedures are an integral part of the existing 'laws and regulations' of the United States through which errors are addressed".

137. Specifically in the context of the present case, the United States contends that the following two points are particularly noteworthy:

> "First, these clemency procedures allow for broad participation by advocates of clemency, including an inmate's attorney and the sending state's consular officer . . . Second, these clemency officials are not bound by principles of procedural default, finality, prejudice standards, or any other limitations on judicial review. They may consider any facts and circumstances that they deem appropriate and relevant, including specifically Vienna Convention claims".

138. The Court would emphasize that the "review and reconsideration" prescribed by it in the *LaGrand* case should be effective. Thus it should "tak[e] account of the violation of the rights set forth in [the] Convention" (*I.C.J. Reports 2001*, p. 516, para. 128 (7)) and guarantee that the violation and the possible prejudice caused by that violation will be fully examined and taken into account in the review and reconsideration process. Lastly, review and reconsideration should be both of the sentence and of the conviction.

139. Accordingly, in a situation of the violation of rights under Article 36, paragraph 1, of the Vienna Convention, the defendant raises his claim in this respect not as a case of "harm to a particular right essential to a fair trial" — a concept relevant to the enjoyment of due process rights under the United States Constitution — but as a case involving the infringement of his rights under

Article 36, paragraph 1. The rights guaranteed under the Vienna Convention are treaty rights which the United States has undertaken to comply with in relation to the individual concerned, irrespective of the due process rights under United States constitutional law. In this regard, the Court would point out that what is crucial in the review and reconsideration process is the existence of a procedure which guarantees that full weight is given to the violation of the rights set forth in the Vienna Convention, whatever may be the actual outcome of such review and reconsideration.

140. As has been explained in paragraphs 128 to 134 above, the Court is of the view that, in cases where the breach of the individual rights of Mexican nationals under Article 36, paragraph 1 *(b)*, of the Convention has resulted, in the sequence of judicial proceedings that has followed, in the individuals concerned being subjected to prolonged detention or convicted and sentenced to severe penalties, the legal consequences of this breach have to be examined and taken into account in the course of review and reconsideration. The Court considers that it is the judicial process that is suited to this task.

141. The Court in the *LaGrand* case left to the United States the choice of means as to how review and reconsideration should be achieved, especially in the light of the procedural default rule. Nevertheless, the premise on which the Court proceeded in that case was that the process of review and reconsideration should occur within the overall judicial proceedings relating to the individual defendant concerned.

142. As regards the clemency procedure, the Court notes that this performs an important function in the administration of criminal justice in the United States and is "the historic remedy for preventing miscarriages

of justice where judicial process has been exhausted" (*Herrera* v. *Collins*, 506 U.S. 390 (1993) at pp. 411-412). The Court accepts that executive clemency, while not judicial, is an integral part of the overall scheme for ensuring justice and fairness in the legal process within the United States criminal justice system. It must, however, point out that what is at issue in the present case is not whether executive clemency as an institution is or is not an integral part of the "existing laws and regulations of the United States", but whether the clemency process as practised within the criminal justice systems of different states in the United States can, in and of itself, qualify as an appropriate means for undertaking the effective "review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in the Convention", as the Court prescribed in the *LaGrand* Judgment (*I.C.J. Reports 2001*, p. 514, para. 125).

143. It may be true, as the United States argues, that in a number of cases "clemency in fact results in pardons of convictions as well as commutations of sentences". In that sense and to that extent, it might be argued that the facts demonstrated by the United States testify to a degree of effectiveness of the clemency procedures as a means of relieving defendants on death row from execution. The Court notes, however, that the clemency process, as currently practised within the United States criminal justice system, does not appear to meet the requirements described in paragraph 138 above and that it is therefore not sufficient in itself to serve as an appropriate means of "review and reconsideration" as envisaged by the Court in the *LaGrand* case. The Court considers nevertheless that appropriate clemency procedures can supplement judicial review and reconsideration, in particular where the judicial system has failed

to take due account of the violation of the rights set forth in the Vienna Convention, as has occurred in the case of the three Mexican nationals referred to in paragraph 114 above.

*

144. Finally, the Court will consider the eighth submission of Mexico, in which it asks the Court to adjudge and declare:

> "That the [United States] shall cease its violations of Article 36 of the Vienna Convention with regard to Mexico and its 52 nationals and shall provide appropriate guarantees and assurances that it shall take measures sufficient to achieve increased compliance with Article 36 (1) and to ensure compliance with Article 36 (2)."

145. In this respect, Mexico recognizes the efforts by the United States to raise awareness of consular assistance rights, through the distribution of pamphlets and pocket cards and by the conduct of training programmes, and that the measures adopted by the United States to that end were noted by the Court in its decision in the *LaGrand* case (*I.C.J. Reports 2001*, pp. 511-513, paras. 121, 123-124). Mexico, however, notes with regret that "the United States program, whatever its components, has proven ineffective to prevent the regular and continuing violation by its competent authorities of consular notification and assistance rights guaranteed by Article 36".

146. In particular, Mexico claims in relation to the violation of the obligations under Article 36, paragraph 1, of the Vienna Convention:

> "*First*, competent authorities of the United States regularly fail to provide the timely notification required by Article 36(1)(b) and thereby to [sic] frustrate the communication and access contemplated by Article 36(1)(a) and the assistance contemplated by Article 36(1)(c). These violations continue notwithstanding the Court's judgment in *LaGrand* and the program described there.
>
> . . . .
>
> Mexico has demonstrated, moreover, that the pattern of regular noncompliance continues. During the first half of 2003, Mexico has identified at least one hundred cases in which Mexican nationals have been arrested by competent authorities of the United States for serious felonies but not timely notified of their consular notification rights."

Furthermore, in relation to the violation of the obligations under Article 36, paragraph 2, of the Vienna Convention, Mexico claims:

> "*Second*, courts in the United States continue to apply doctrines of procedural default and non-retroactivity that prevent those courts from reaching the merits of Vienna Convention claims, and those courts that have addressed the merits of those claims (because no procedural bar applies) have repeatedly held that no remedy is available for a breach of the obligations of Article 36 . . . Likewise, the United States' reliance on clemency proceedings to meet *LaGrand*'s requirement of review and reconsideration represents a deliberate decision to allow these legal rules and doctrines to continue to have their inevitable effect. Hence, the United

> States continues to breach Article 36(2) by failing to give full effect to the purposes for which the rights accorded under Article 36 are intended."

147. The United States contradicts this contention of Mexico by claiming that "its efforts to improve the conveyance of information about consular notification are continuing unabated and are achieving tangible results". It contends that Mexico "fails to establish a 'regular and continuing' pattern of breaches of Article 36 in the wake of *LaGrand*".

148. Mexico emphasizes the necessity of requiring the cessation of the wrongful acts because, it alleges, the violation of Article 36 with regard to Mexico and its 52 nationals still continues. The Court considers, however, that Mexico has not established a continuing violation of Article 36 of the Vienna Convention with respect to the 52 individuals referred to in its final submissions; it cannot therefore uphold Mexico's claim seeking cessation. The Court would moreover point out that, inasmuch as these 52 individual cases are at various stages of criminal proceedings before the United States courts, they are in the state of *pendente lite*; and the Court has already indicated in respect of them what it regards as the appropriate remedy, namely review and reconsideration by reference to the breach of the Vienna Convention.

149. The Mexican request for guarantees of non-repetition is based on its contention that beyond these 52 cases there is a "regular and continuing" pattern of breaches by the United States of Article 36. In this respect, the Court observes that there is no evidence properly before it that would establish a general pattern. While it is a matter of concern that, even in the wake of the *LaGrand* Judgment, there remain a substantial number of cases of failure to carry out the obligation to furnish consular information to Mexican nationals, the Court notes that the United States has been making considerable efforts to ensure that its law enforcement authorities provide consular information to every arrested person they know or have reason to believe is a foreign national. Especially at the stage of pre-trial consular information, it is noteworthy that the United States has been making good faith efforts to implement the obligations incumbent upon it under Article 36, paragraph 1, of the Vienna Convention, through such measures as a new outreach programme launched in 1998, including the dissemination to federal, state and local authorities of the State Department booklet mentioned above in paragraph 63. The Court wishes to recall in this context what it has said in paragraph 64 about efforts in some jurisdictions to provide the information under Article 36, paragraph 1 *(b)*, in parallel with the reading of the "Miranda rights".

150. The Court would further note in this regard that in the *LaGrand* case Germany sought, *inter alia*, "a straightforward assurance that the United States will not repeat its unlawful acts" (*I.C.J. Reports 2001*, p. 511, para. 120). With regard to this general demand for an assurance of non-repetition, the Court stated:

> "If a State, in proceedings before this Court, repeatedly refers to substantial activities which it is carrying out in order to achieve compliance with certain obligations under a treaty, then this expresses a commitment to follow through with the efforts in this regard. The programme in question certainly cannot provide an assurance that there will never again be a failure by the United States to observe the obligations of notification under Article

> 36 of the Vienna Convention. But no State could give such a guarantee and Germany does not seek it. The Court considers that the commitment expressed by the United States to ensure implementation of the specific measures adopted in performance of its obligations under Article 36, paragraph 1 *(b)*, must be regarded as meeting Germany's request for a general assurance of non-repetition." (*I.C.J. Reports 2001*, pp. 512-513, para. 124.)

The Court believes that as far as the request of Mexico for guarantees and assurances of non-repetition is concerned, what the Court stated in this passage of the *LaGrand* Judgment remains applicable, and therefore meets that request.

*

* *

151. The Court would now re-emphasize a point of importance. In the present case, it has had occasion to examine the obligations of the United States under Article 36 of the Vienna Convention in relation to Mexican nationals sentenced to death in the United States. Its findings as to the duty of review and reconsideration of convictions and sentences have been directed to the circumstance of severe penalties being imposed on foreign nationals who happen to be of Mexican nationality. To avoid any ambiguity, it should be made clear that, while what the Court has stated concerns the Mexican nationals whose cases have been brought before it by Mexico, the Court has been addressing the issues of principle raised in the course of the present proceedings from the viewpoint of the general application of the Vienna Convention, and there can be no question of making an *a contrario* argument in respect of any of the Court's findings in the present Judgment. In other words, the fact that in this case the Court's ruling has concerned only Mexican nationals cannot be taken to imply that the conclusions reached by it in the present Judgment do not apply to other foreign nationals finding themselves in similar situations in the United States.

* *

152. By its Order of 5 February 2003 the Court, acting on a request by Mexico, indicated by way of provisional measure that "The United States of America shall take all measures necessary to ensure that Mr. César Roberto Fierro Reyna, Mr. Roberto Moreno Ramos and Mr. Osvaldo Torres Aguilera are not executed pending final judgment in these proceedings" (*I.C.J. Reports 2003*, pp. 91-92, para. 59 (I)) (see paragraph 21 above). The Order of 5 February 2003, according to its terms and to Article 41 of the Statute, was effective pending final judgment, and the obligations of the United States in that respect are, with effect from the date of the present Judgment, replaced by those declared in this Judgment. The Court has rejected Mexico's submission that, by way of *restitutio in integrum*, the United States is obliged to annul the convictions and sentences of all of the Mexican nationals the subject of its claims (see above, paragraphs 115-125). The Court has found that, in relation to these three persons (among others), the United States has committed breaches of its obligations under Article 36, paragraph 1 *(b)*, of the Vienna Convention and Article 36, paragraphs 1 *(a)* and *(c)*, of that Convention; moreover,

in respect of those three persons alone, the United States has also committed breaches of Article 36, paragraph 2, of the said Convention. The review and reconsideration of conviction and sentence required by Article 36, paragraph 2, which is the appropriate remedy for breaches of Article 36, paragraph 1, has not been carried out. The Court considers that in these three cases it is for the United States to find an appropriate remedy having the nature of review and reconsideration according to the criteria indicated in paragraphs 138 *et seq.* of the present Judgment.

*

* *

153. For these reasons,

THE COURT,

(1) By thirteen votes to two,

Rejects the objection by the United Mexican States to the admissibility of the objections presented by the United States of America to the jurisdiction of the Court and the admissibility of the Mexican claims;

IN FAVOUR: *President* Shi; *Vice-President* Ranjeva; *Judges* Guillaume, Koroma, Vereshchetin, Higgins, Kooijmans, Rezek, Al-Khasawneh, Buergenthal, Elaraby, Owada, Tomka;

AGAINST: *Judge* Parra-Aranguren; *Judge* ad hoc Sepúlveda;

(2) Unanimously,

Rejects the four objections by the United States of America to the jurisdiction of the Court;

(3) Unanimously,

Rejects the five objections by the United States of America to the admissibility of the claims of the United Mexican States;

(4) By fourteen votes to one,

Finds that, by not informing, without delay upon their detention, the 51 Mexican nationals referred to in paragraph 106 (1) above of their rights under Article 36, paragraph 1 *(b)*, of the Vienna Convention on Consular Relations of 24 April 1963, the United States of America breached the obligations incumbent upon it under that subparagraph;

IN FAVOUR: *President* Shi; *Vice-President* Ranjeva; *Judges* Guillaume, Koroma, Vereshchetin, Higgins, Kooijmans, Rezek, Al-Khasawneh, Buergenthal, Elaraby, Owada, Tomka; *Judge* ad hoc Sepúlveda;

AGAINST: *Judge* Parra-Aranguren;

(5) By fourteen votes to one,

Finds that, by not notifying the appropriate Mexican consular post without delay of the detention of the 49 Mexican nationals referred to in paragraph 106 (2) above and thereby depriving the United Mexican States of the right, in a timely fashion, to render the assistance provided for by the Vienna Convention to the individuals concerned, the United States of America breached the obligations incumbent upon it under Article 36, paragraph 1 *(b)*;

IN FAVOUR: *President* Shi; *Vice-President* Ranjeva; *Judges* Guillaume, Koroma, Vereshchetin, Higgins, Kooijmans, Rezek, Al-Khasawneh, Buergenthal, Elaraby, Owada, Tomka; *Judge* ad hoc Sepúlveda;

AGAINST: *Judge* Parra-Aranguren;

(6) By fourteen votes to one,

Finds that, in relation to the 49 Mexican nationals referred to in paragraph 106 (3) above, the United States of America deprived the United Mexican States of the right, in a timely fashion, to communicate with and have access to those nationals and to visit them in detention, and thereby breached the obligations incumbent upon it under Article 36, paragraph 1 *(a)* and *(c)*, of the Convention;

IN FAVOUR: *President* Shi; *Vice-President* Ranjeva; *Judges* Guillaume, Koroma, Vereshchetin, Higgins, Kooijmans, Rezek, Al-Khasawneh, Buergenthal, Elaraby, Owada, Tomka; *Judge* ad hoc Sepúlveda;

AGAINST: *Judge* Parra-Aranguren;

(7) By fourteen votes to one,

Finds that, in relation to the 34 Mexican nationals referred to in paragraph 106 (4) above, the United States of America deprived the United Mexican States of the right, in a timely fashion, to arrange for legal representation of those nationals, and thereby breached the obligations incumbent upon it under Article 36, paragraph 1 *(c)*, of the Convention;

IN FAVOUR: *President* Shi; *Vice-President* Ranjeva; *Judges* Guillaume, Koroma, Vereshchetin, Higgins, Kooijmans, Rezek, Al-Khasawneh, Buergenthal, Elaraby, Owada, Tomka; *Judge* ad hoc Sepúlveda;

AGAINST: *Judge* Parra-Aranguren;

(8) By fourteen votes to one,

Finds that, by not permitting the review and reconsideration, in the light of the rights set forth in the Convention, of the conviction and sentences of Mr. César Roberto Fierro Reyna, Mr. Roberto Moreno Ramos and Mr. Osvaldo Torres Aguilera, after the violations referred to in subparagraph (4) above had been established in respect of those individuals, the United States of America breached the obligations incumbent upon it under Article 36, paragraph 2, of the Convention;

IN FAVOUR: *President* Shi; *Vice-President* Ranjeva; *Judges* Guillaume, Koroma, Vereshchetin, Higgins, Kooijmans, Rezek, Al-Khasawneh, Buergenthal, Elaraby, Owada, Tomka; *Judge* ad hoc Sepúlveda;

AGAINST: *Judge* Parra-Aranguren;

(9) By fourteen votes to one,

Finds that the appropriate reparation in this case consists in the obligation of the United States of America to provide, by means of its own choosing, review and reconsideration of the convictions and sentences of the Mexican nationals referred to in subparagraphs (4), (5), (6) and (7) above, by taking account both of the violation of the rights set forth in Article 36 of the Convention and of paragraphs 138 to 141 of this Judgment;

IN FAVOUR: *President* Shi; *Vice-President* Ranjeva; *Judges* Guillaume, Koroma, Vereshchetin, Higgins, Kooijmans, Rezek, Al-Khasawneh, Buergenthal, Elaraby, Owada, Tomka; *Judge* ad hoc Sepúlveda;

AGAINST: *Judge* Parra-Aranguren;

(10) Unanimously,

Takes note of the commitment undertaken by the United States of America to ensure implementation of the specific measures adopted in performance of its obligations under Article 36, paragraph 1 *(b)*, of the Vienna Convention; and *finds* that this commitment must be regarded as meeting the request by the United Mexican States for guarantees and assurances of non-repetition;

(11) Unanimously,

Finds that, should Mexican nationals nonetheless be sentenced to severe penalties, without their rights under Article 36, paragraph 1 *(b)*, of the Convention having been respected, the United States of America shall provide, by means of its own choosing, review and reconsideration of the conviction and sentence, so as to allow full weight to be given to the violation of the rights set forth in the Convention, taking account of paragraphs 138 to 141 of this Judgment.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this thirty-first day of March, two thousand and four, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the United Mexican States and the Government of the United States of America, respectively.

(Signed) SHI Jiuyong,
President.

(Signed) Philippe COUVREUR,
Registrar.

President SHI and Vice-President RANJEVA append declarations to the Judgment of the Court; Judges VERESHCHETIN, PARRA-ARANGUREN and TOMKA and Judge *ad hoc* SEPÚLVEDA append separate opinions to the Judgment of the Court.

(Initialled) J.Y.S.

(Initialled) Ph.C.

Supreme Court, U.S.
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No. 04-5928

IN THE
SUPREME COURT OF THE UNITED STATES

JOSE ERNESTO MEDELLIN,
Petitioner,

v.

DOUG DRETKE, Director,
Texas Department of Criminal Justice,
Institutional Division,
Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

1. Whether the lower courts properly determined that Medellin's Vienna Convention claim was procedurally barred?

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

This is a federal habeas corpus proceeding in which Petitioner Jose Ernesto Medellin ("Medellin")[1] unsuccessfully challenged his presumptively valid state capital murder conviction and sentence of death pursuant to 28 U.S.C. §§ 2241 and 2254. He now seeks certiorari review of the Fifth Circuit Court of Appeals' decision denying a certificate of appealability ("COA") to review the district court's denial of relief on his consular notification claim. However, as discussed below, the Court of Appeals properly applied established federal law and correctly concluded that Medellin was not entitled to a COA. Because Medellin does not present a compelling reason for this Court to review his claims, his petition for certiorari review should be denied.

STATEMENT OF THE CASE

I. Facts of the Crime

The Court of Criminal Appeals of Texas adequately summarized the facts of the offense in its opinion on direct appeal:

> On the night of June 24, 1993, a gang called the "Black and Whites" had come together to initiate a new member, Raul Villareal. The other gang members present were [Medellin], Peter Cantu, Roman Sandoval, Efrain Perez, and Sean O'Brien. Roman's brother Frank, and [Medellin's] fourteen-year-old brother, Venancio, were also tagging along. The initiation involved fighting each member of the gang for a five to ten minute period. After the fighting was over, Raul was

---

[1] Respondent Doug Dretke is referred to herein as "the Director."

welcomed into the gang.

Meanwhile, the fourteen-year-old Jennifer Ertman and sixteen-year-old Elizabeth Pena were visiting a girlfriend. Around 11:15 p.m., Jennifer and Elizabeth decided to head for their respective homes by way of a shortcut across the railroad tracks. Jennifer and Elizabeth first encountered Roman and Frank as they made their way home, but managed to pass the brothers without incident. However, as they passed [Medellin], he attempted to engage Elizabeth in conversation. When Elizabeth tried to run from [Medellin], he grabbed her and threw her to the ground. Elizabeth screamed for Jennifer to help her. In response to her friend's cries, Jennifer ran back to help, but Peter and Sean grabbed her and threw her down as well. At this point, the Sandoval brothers decided that it was time to leave.

Subsequent boastful statements of [Medellin] and other gang members revealed that what ensued was a brutal gang rape of both girls. After the girls were thrown to the ground, the gang members orally, vaginally, and anally raped both of them. After the assault, [Medellin], Raul, Efrain, and Peter regrouped at Peter's house where he lived with his brother and sister-in-law, Joe and Christina Cantu, to brag about their exploits. Christina noticed that Raul was bleeding and that Efrain had blood on his shirt. She asked the group what had occurred and [Medellin] responded that they "had fun" and that their exploits would be seen on the television news. [Medellin] was hyper, giggling, and laughing. He boasted to Joe and Christina that the group had met two "hos" [sic] and had sex with them. He also told the couple that the two girls had been talking to them and that he punched one of the girls because she had started screaming after he grabbed her.

[Medellin] related to Joe and Christina that he sexually assaulted one of the girls and bragged about having "opened" her since she had apparently been a virgin. As if to accentuate his conquest, [Medellin] showed Christina his blood soaked underwear. [Medellin] related that after another gang member sexually assaulted the second girl, he "turned her around" and anally raped her. [Medellin] also bragged of having forced both girls to engage in oral sex with him. Peter joined the group shortly thereafter and began to divide up the money and jewelry that had been taken from the two girls. Peter gave [Medellin] a ring with an "E" design on it so that he could give it to his girlfriend, Esther.

When Christina asked the group what happened to the girls, [Medellin] told her that they had been killed so that they could not identify their attackers. [Medellin] then elaborated that it would have been easier with a gun, but because they did not have one at the scene of the incident, he took off one of his shoelaces and strangled at least one of the girls with it.[2] Both Joe and Christina noted

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[2] Apparently, all of the gang members were talking about having killed the two girls which resulted in some degree of confusion on the part of the witness. However, Christina testified that she understood [Medellin] to have said that he personally participated in killing *both* of the girls, while Joe testified that he understood [Medellin] to have said that he strangled one of the girls while his

> that [Medellin] complained of the difficulty the group encountered in killing the girls. After [Medellin] related the difficulty he encountered in strangling one of the girls, he said that he put his foot on her throat because she would not die.
>
> Christina subsequently convinced her husband to report the incident to the police. By the time bodies were discovered, they were so badly decomposed that dental records were required to identify them. However, enough tissue remained for the medical examiner to determine that each girl had died of a trauma to the neck consistent with strangulation.
>
> Eventually, all of the individuals who participated in the rapes and murders were apprehended. After [Medellin] was arrested, he gave a written and then oral, tape-recorded statement, the latter of which was never offered into evidence at trial. In the written statement, [Medellin] admitted to having oral sex with Elizabeth, but commented that he only peripherally participated in her murder.

Medellin v. State, No. 71, 997, slip op. at 1-4 (Tex. Crim. App. 1997). On September 16, 1994, the jury convicted Medellin of murder during the course of a sexual assault, a capital offense. Tr 294.[3]

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companions killed the other girl.

[3] "Tr" refers to the transcript of pleadings and documents filed with the court during the trial - followed by page numbers. "SR" refers to the state record of transcribed trial proceedings, preceded by volume number and followed by page numbers. "SHTr" refers to the

II. Fact Relating to Punishment

The Court of Criminal Appeals also summarized the evidence introduced during the punishment phase of Medellin's trial:

> At the punishment stage of trial, [Medellin's] parents testified that [Medellin] had been a good student and had made good grades until he entered the sixth grade. After that point, [Medellin's] behavior deteriorated rapidly. [Medellin] was suspended from middle school in the Fall of 1990 for "misconduct and repeated misbehavior." In high school, [Medellin] was well known to administrators due to his repeated disciplinary violations. In January of 1992, [Medellin] was restrained by an assistant principal from attacking another student. Furthermore, [Medellin] repeatedly threatened to kill the assistant principal and to "fix it" so that he could not father any more children. [Medellin] told the assistant principal that life meant nothing to him ([Medellin]) and that someday he would be featured on television or the front page of the newspaper as a result of having killed someone, "probably a cop." In October of 1992, [Medellin] was involved in a gang-related fight at school which resulted in his expulsion from school and subsequent placement at an alternative school.

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state habeas transcript - the transcript of pleading and documents filed with the court during the state habeas proceedings - followed by page numbers. "FF" refers to the numbered findings of fact issued by the state habeas court. "CL" refers to the numbered conclusions of law issued by the state habeas court.

> [Medellin] was also known to the police. In January of 1992, police were called to a restaurant in response to a disturbance call involving a terroristic threat. When initially confronted by police, [Medellin] refused to stop or to remove his hand from his pocket. He was later found to have a .38 caliber pistol concealed in his pocket. In June of 1993, [Medellin] was found at the emergency room of a Houston hospital where Efrain Perez was being treated for a gunshot wound. Testimony from an employee of the hospital regarding a conversation the employee overheard between the [Medellin] and co-defendant Cantu indicated that the two knew who had shot Perez and that they were going to go after that individual themselves. When a police officer arrived to investigate the shooting, [Medellin] was belligerent and uncooperative.
>
> While [Medellin] was in jail awaiting trial on the instant offense, a search of the [Medellin's] cell turned up a "shank" which had been fashioned from a disposable razor. Another search of [Medellin]'s cell a year later, the day before punishment arguments were to be heard in the instant case, turned up another "shank" in the making.

Medellin, slip op. at 4-5. At the conclusion of the punishment phase on October 11, 1994, Medellin was sentenced to death. Tr 308.

III. Direct Appeal & Postconviction Proceedings

The Court of Criminal Appeals affirmed both the

conviction and the sentence in an unpublished opinion issued on March 19, 1997. *Medellin v State*, No. 71,997. Medellin did not petition this Court for certiorari review.

Following the denial of his direct appeal, Medellin filed an application for writ of habeas corpus in the trial court on March 26, 1998. SHTr 002. The trial court entered findings of fact and conclusions of law recommending that relief be denied. SHTr 198-224. Based upon those findings and conclusion, the Court of Criminal Appeals rejected Medellin's application for habeas corpus relief. *Ex Parte Medellin*, No. 50,191-01 (Tex. Crim. App. Oct. 3, 2001).

Medellin's federal habeas petition was filed in the United Stated District Court for the Southern District of Texas, Houston Division on November 11, 2001, then later amended on July 18, 2002. The district court denied federal habeas relief and certificate of appealability on all claims. *Medellin v. Cockrell*, H-01-4078 (S.D. Tex. Jun. 26, 2003)[4]. Medellin's subsequent application for certificate of appealability to the Fifth Circuit was denied on May 20, 2004. *Medellin v. Dretke*, 371 F.3d 270 (5th Cir. 2004). The instant petition for certiorari followed.

ARGUMENT

I. The Question Presented for Review Are Unworthy of the Court's Attention.

Supreme Court Rule 10 provides that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. Medellin advances no special or important reason in this case, and none exists. Thus, the petition presents no important questions of law to justify this Court's exercise of its certiorari jurisdiction.

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[4] The district court's opinion is reprinted in its entirety in the appendix to Medellin's petition. For this Court's convenience, the Director will cite the district court's opinion as "Appendix" followed by the appropriate page number.

Further Medellin has not shown that he was entitled to a COA. Federal law requires a petitioner seeking COA to make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253. This standard is satisfied by demonstrating that "jurists of reason could disagree with the district court's resolution of [the] constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). Notably, the question of whether the district court's resolution is debatable among jurists of reason is a threshold inquiry that does not require the full consideration of the factual or legal grounds offered in support of the claims. *Miller-El*, 537 U.S. at 336.

Moreover, this proceeding is governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), which states in relevant part that:

> (d) An application for a writ of habeas corpus on behalf of person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim —
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(b) (West 2003). This Court has held that a state court decision is "contrary" to established federal law if the state court "applies a rule that contradicts the governing law set forth in [the Court's] cases," or confronts facts that are "materially indistinguishable" from a relevant Supreme Court precedent, yet reaches an opposite result. *(Terry) Williams v. Taylor*, 529 U.S. 362, 405-06 (2000). A state court "unreasonably applies" clearly established federal law if it correctly identifies the governing precedent but unreasonably applies it to the facts of a particular case. *Id.* at 407-09.

The Court also held that a federal habeas court's inquiry into reasonableness should be objective rather than subjective, and a court should not issue the writ simply because that court concludes in its independent judgment that the relevant state court decision applied clearly established federal law erroneously or incorrectly. *Williams*, 529 U.S. at 409-11. Rather, federal habeas relief is only merited where the state court decision is both incorrect *and* objectively unreasonable. *Id.* at 411. In other words, habeas relief is inappropriate when a state court, at a minimum, reaches a "satisfactory conclusion." *Id.* at 410-11 (citing *Wright v. West*, 505 U.S. 277, 287 (1992)). The Fifth Circuit has further explained that it is the state court's "ultimate decision" that is to be tested for reasonableness, "not every jot of its reasoning." *Santellan v. Cockrell*, 271 F.3d 190, 193 (5th Cir.

2001).[5]

II. The Court Should Deny Medellin's Petition For Certiorari Review Because the Lower Courts Followed Established Federal Law in Deciding That Medellin's Consular Notification Claim Was Procedurally Barred.

The district court and the court of appeals below both held that Medellin's claim alleging that he was denied consular assistance in violation of his rights under the Vienna Convention on the Law of Treaties, May 22, 1696 art. 31(1), 8 I.L.M. 4 (1969) ("Vienna Convention"), was procedurally barred in federal court. Appendix at 79-82; *Medellin*, 371 F.3d 279-290. The state habeas court, the first court to consider the claim, concluded that in light of Medellin's failure to object to the alleged Vienna Convention violation during trial - and thus, properly preserve the issue for appeal - he had waived his right to assert the claim on post-conviction review. Appendix at 79, 131. Based upon consistent recognition by the Fifth Circuit that Texas' contemporaneous objection rule constitutes an adequate and independent state ground that procedurally bars federal habeas review[6], the lower courts held that Medellin was procedurally barred from obtaining federal habeas relief on this claim. Appendix at 80, 131.

This application of the procedural default rule to Medellin's consular notification claim is compelled by precedent established in this Court. First, it is well settled that "[t]his Court will not take up a question of federal law presented in a case 'if the decision of [the state court] rests on a state law ground that is independent and adequate to support the judgment.'" *Lee v. Kemna*, 534 U.S. 362, 375 (2002) (quoting *Coleman v. Thompson*, 501 U.S. 722, 723 (1991)). In the habeas context, the application of this procedural default doctrine is grounded in concerns of comity and federalism. *Coleman*, 501 U.S. at 730.

> Without the rule, a federal district court would be able to do in habeas what this Court could not do on direct review; habeas could offer state prisoners whose custody was supported by independent and adequate state grounds an end run around the limits of this Court's jurisdiction and a means to undermine the State's interest in enforcing its law.

Id. at 730-31. Thus, because the state court's adjudication of Medellin's Vienna Convention claim was based upon a state procedural ground independent of the merits and adequate to support the judgment, the lower courts were precluded by federal law from granting relief on the merits.

Moreover, as noted by the district court and Fifth Circuit below, the application of the procedural bar in this case is controlled by the Court's decision in *Breard v. Greene*, 523 U.S. 371 (1998). In *Breard*, the Court directly addressed the question of whether a petitioner's consular notification claim is subject to the procedural default doctrine, and concluded that Vienna Convention claims, like constitutional claims, can be procedurally defaulted, even in a death penalty case. 523 U.S. at 375-77. Although, Medellin attempted to convince the lower courts that the decisions by the International Court of Justice in the *LeGrand Case* (*Germany v. United States of America*), 2001 ICJ 104

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[5] *See also Neal v. Puckett*, 286 F.3d 230, 246 (5th Cir. 2002) (en banc) (holding that a federal court's "focus on the 'unreasonable application' test under Section 2254(d) should be on the ultimate legal conclusion that the state court reached and not on whether the state court considered and discussed every angle of the evidence"), *cert. denied*, 537 U.S. 1104 (2003).

[6] *E.g. Fisher v. State*, 169 F.3d 295, 300 (5th Cir. 1999); *Sharp v. Johnson*, 107 F.3d 282, 285-86 (5th Cir. 1997); *Nichols v. Scott*, 69 F.3d 1255, 1280 n. 48 (5th Cir. 1995); *Amos v. Scott*, 61 F.3d 333, 345 (5th Cir. 1995).

(Judgment of June 27) ("*Le Grand*"), and *Avena and Other Mexican Nationals* (*Mexico v. United States of America*), 2004 ICJ 128 (Judgment of March 31 ("*Avena*"), precluded the application of any procedural bar to his consular notification claim, neither the district court nor the Fifth Circuit were willing to depart from precedent set by this Court in *Breard*. The district court stated that,

> [t]he concerns of comity, federalism, and finality of the state judgments suggest that this [c]ourt refrain from jettisoning the procedural bar doctrine until the Supreme Court reconciles its caselaw with the ICJ action in the *LaGrand Case*. This [c]ourt is simply wary of finding that the ICJ overruled entrenched Supreme Court precedent.

Appendix at 82.

The Fifth Circuit echoed a similar sentiment in its opinion on this issue:

> Though *Avena* and *LeGrand* were decided after *Breard*, and contradict *Breard*, we may not disregard the Supreme Court's clear holding that ordinary procedural default rules can bar Vienna Convention claims. "If a precedent of the Supreme Court has direct application in a case, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."

Medellin, 371 F.3d at 280 (quoting *Rodriguez de Quijas v. Shearson/American Express*, 490 U.S. 477, 484 (1989)).

To the extent that Medellin's petition insists that the lower courts should have ignored directly controlling federal law in adjudicating his Vienna Convention claim, it is unsupportable. As aptly noted by the Fifth Circuit, the court of appeals is bound to follow Supreme Court precedent that bears immediately upon a particular issue. *Rodgriguez de Quijas*, 490 U.S. at 484; *Agostini v. Felton et al.*, 521 U.S. 203, 237-38 (1997). Because the lower courts properly applied the procedural default doctrine in accordance with precedent established in this Court, Medellin's request for further review of his consular notification claim should be denied.

III. Even if This Court Were to Find it Necessary to Revisit *Breard* in Light of the *LeGrand* and *Avena* Decisions, the Present Case Does Not Present an Appropriate Opportunity to do Such.

Medellin argues that this Court should grant certiorari to in order to bring the United States into compliance with its obligation to abide by the *Avena* judgment. Specifically, he notes that the ruling in *Breard*, allowing the procedural default of consular notification claims, conflicts with *Avena*, wherein the ICJ held that the imposition of the procedural default rule to cases where a criminal defendant was deprived of his consular rights under the Vienna Convention would essentially "prevent[] full effect from being given to the purposes for which the rights according under the article are intended." *Avena*, ¶ 113 (internal citations omitted). However, the application of *Avena* would have no effect on the ultimate disposition of Medellin's Vienna Convention claim.

In deciding *Avena*, the ICJ contemplated what would constitute "an adequate reparation for the violations of Article 36 [consular notification rights]" and concluded:

> It follows that the remedy to make good these violations should consist in an obligation on the United States to permit review and reconsideration of these nationals' cases by the United States

> courts...with a view to ascertain whether in each case the violation of Article 36 committed by competent authorities cause actual prejudice to the defendant in the process of administration of criminal justice.

Avena ¶ 121. Thus, assuming that *Avena* were enforceable here, Medellin would be entitled to have the courts of this country review and consider the effect of the Vienna Convention violation on his criminal proceedings. Medellin was already granted this type of merits review in the both his state and federal habeas proceedings.

Although the state habeas and district courts' adjudication of Medellin's consular notification claim rested primarily on the imposition of the procedural bar, the courts nevertheless considered its merits in the alternative. The state habeas court found that this claim did not warrant relief because "[Medellin] fail[ed] to show that he was harmed by any lack of notification to the Mexican consulate concerning his arrest for capital murder; [he] was provided with effective legal representation upon [his] request; and, [his] constitutional rights were safeguarded." SHTr 217. On federal habeas, the district court reviewed this finding to determine whether it was either contrary to, or an unreasonable application of clearly established federal law. Appendix at 84. The court stated that Medellin would have to "show concrete, non-speculative harm from the denial of his consular rights" in order to obtain relief. *Id* (citing *Breard*, 523 U.S. at 377). Applying this standard, the court concluded,

> Medellin's allegations of prejudice are speculative. The police officers informed Medellin of his right to legal representation before he confessed to involvement in the murders. Medellin waived his right to advisement by an attorney. Medellin does not challenge the voluntary nature of his confession. There is no indication that, if informed of his consular rights, Medellin would not have waived those rights as he did his right to counsel. Medellin fails to establish a "casual connection between the Vienna Convention violation of his statements. [Medellin] has failed to show prejudice for the Vienna Convention violation.

Appendix at 84-85.

Notably, the lower court's analysis is consistent with federal law, as set out in *Breard*, and with the *Avena* decision. When deciding *Breard* in 1998, this Court stated that even if a petitioner had properly raised and proven a violation of the right to consular notification, "it is extremely doubtful that the violation should result in the overturning of a final judgment of the conviction without some showing that the violation had an effect on the trial." 523 U.S. at 377. More importantly, the ICJ recently explained in *Avena* that,

> The Court reaffirms that the case before it concerns Article 36 of the Vienna Convention and not the correctness as such of any conviction of sentencing. The question of whether the violations of Article 36, paragraph 1, are to be regarding as having, in the casual sequence of events, ultimately led to convictions and severe penalties is an integral part of the criminal proceedings before the court of the United States and is for them to determine in the process of review and reconsideration. In doing so, it is for the court of the United States to examine the fact, and in particular the prejudices and its causes, taking account of the violation of the rights set forth in the Convention.

Avena, ¶ 122. The state habeas and district courts' evaluation of the potential harm arising from the alleged violation in this case is clearly consistent with what the international court's decision in *Avena*.[7]

Accordingly, even assuming that *Avena* were enforceable in this case, it would have no effect. Medellin has already been afforded the full merits review mandated by the ICJ. Because Medellin has already received the "benefit" of the *Avena* decision, granting certiorari to review procedural default issue would essentially result in an advisory opinion. As such this case does not present an appropriate opportunity to revisit *Breard*. *See Alabama v. Shelton*, 535 U.S. 654, 676 (2002)(noting this Court longstanding refusal to issue advisory opinions).

CONCLUSION

For the foregoing reasons, Medellin's petition for writ of certiorari should be denied.

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[7] Notably, Medellin does not seek review of the lower court's adjudication of the merits of his consular notification claim; rather, his petition only requests review of the procedural default issue. Thus to the extent that he would now attempt to challenge the correctness of the merits review, that argument has been waived. *See, Heath v. Alabama*, 474 U.S. 82, 87 (1985); *Illinois v. Gates*, 462 U.S. 213, 218-222 (1983) (This Court has long held that it will neither decide issues raised for the first time on petition for certiorari); *see also Tacon v. Arizona*, 410 U.S. 351, 352 (1973); *Hill v. California*, 401 U.S. 797, 805-806 (1971); *Cardinale v. Louisiana*, 394 U.S. 437, 438-39 (1969).

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Reply of petitioner Jose Ernesto Medellin

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IN THE

Supreme Court of the United States

JOSE ERNESTO MEDELLIN,
Petitioner,
v.
DOUG DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,
Respondent.

ON PETITION FOR A WRIT OF *CERTIORARI* TO THE FIFTH CIRCUIT COURT OF APPEALS

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INTEREST OF *AMICI CURIAE*

This Brief of *Amici Curiae* is respectfully submitted in support of Petitioner by several bar associations as well as several human rights and civil rights organizations.[1] *Amici* include Amnesty International, the Association of the Bar of the City of New York, Hispanic National Bar Association, Human Rights First, Human Rights Watch, League of United Latin American Citizens, Mexican American Bar Association, Mexican American Legal Defense and Educational Fund, Minnesota Advocates for Human Rights and the National Association of Criminal Defense Lawyers.[2]

Each of these bar associations and human rights groups recognize the importance of U.S. compliance with international law, as indicated by the issues set forth in this brief. *Amici* have observed firsthand the issues that arise when application and interpretation of the Vienna Convention on Consular Relations, *opened for signature* Apr. 24, 1963, 21 U.S.T 77, 596 U.N.T.S. 261 ("Vienna Convention") intersects with state and federal criminal law. Such issues arise on an almost daily basis. Without appropriate guidance from this Court, however, the state and federal courts have frequently failed to provide meaningful review and appropriate relief for Vienna

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[1] *Amici Curiae* certify that this brief is filed with written consent of all parties, said consents having been lodged with the Court. Supreme Court Rule 37.2(a). They also certify that no counsel for either party authored the brief in whole or in part and that no person or entity, other than *amici curiae*, their members, and their counsel, made any monetary contribution to the preparation or submission of this brief. Supreme Court Rule 37.6.

[2] A complete description of *Amici Curiae* is located in the Appendix.

Convention violations.

The participation of *Amici Curiae* will assist this Court in understanding the profound implications and practical consequences of these failings, and what is required to remedy these shortcomings.

SUMMARY OF ARGUMENT

In *Avena*, the International Court of Justice ("ICJ") definitively interpreted the Vienna Convention as mandating specific relief in the case of Petitioner Jose Ernesto Medellin ("Petitioner" or "Mr. Medellin") and 50 other Mexican death row inmates in U.S. prisons who were not informed of their right to consular assistance. *See Case Concerning Avena and Other Mexican Nationals* (Mex. v. U.S.), 2004 I.C.J. (Judgment of March 31, 2004) ("*Avena*");[3] Vienna Convention, art. 36, para. 1. In *Medellin v. Dretke*, 371 F.3d 270 (5th Cir. 2004), however, the Fifth Circuit Court of Appeals disregarded the Vienna Convention and the ICJ in denying Mr. Medellin's application for post-conviction relief on the grounds that any violation was procedurally defaulted and was not an individually enforceable right. The Fifth Circuit's ruling, and similar decisions of many other state and federal courts, are in direct conflict with the ICJ's ruling in *Avena* and the international obligations of the United States under the Vienna Convention, thereby necessitating this petition for *certiorari*.

Long before Petitioner's case arose, the political branches of the United States government made the policy choice entrusted to them by the United States Constitution to ensure reciprocal protection for U.S. citizens abroad by negotiating and ratifying the Vienna Convention. The political branches also negotiated and ratified the related Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, *opened for signature* Apr. 24, 1963, 21 U.S.T. 325, 596 U.N.T.S. 261 ("Optional Protocol"). Significantly, the Optional Protocol vests the International Court of Justice with jurisdiction to resolve disputes over the interpretation and application of the Vienna Convention.

In recent years, federal and state courts have largely either ignored or failed to respond to repeated violations of the Vienna Convention despite their constitutional duty to uphold the rule of law. These courts have frequently relied on the Supreme Court's *per curiam* denial of relief in *Breard v. Greene*, 523 U.S. 371 (1998), as authority for failing to address Vienna Convention violations. *Breard* has also been the basis for these courts to disregard the ICJ's 2001 decision interpreting the Vienna Convention in *Case Concerning LaGrand* (Ger. v. U.S.), 2001 I.C.J. (Judgment of June 27, 2001) ("*LaGrand*") and the 2004 decision in *Avena*. Moreover, the Supreme Court's denial of *certiorari* in cases involving Vienna Convention issues has left the *per curiam* decision in *Breard* as its only significant statement on the Vienna Convention. The lower courts' confusion on these issues and conflicting rulings warrant clarification from this Court.

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[3] The opinions of the International Court of Justice are available at www.icj-cij.org.

ARGUMENT

I. THIS CASE PRESENTS A DIRECT CONFLICT BETWEEN THE ICJ AND AN AMERICAN COURT, AND THIS COURT'S RESOLUTION OF THE CONFLICT WILL IMPACT MANY PENDING CASES.

This is the right case and the right time for the Supreme Court to address these important issues.[4]

First, and foremost, Mr. Medellin's case presents a direct conflict between the ICJ's interpretation of what must happen to Mr. Medellin as a result of the acknowledged Vienna Convention violations and the Fifth Circuit's interpretation thereof. It also presents the broader

question of whether and how federal and state courts must adhere to the ICJ's judgments regarding the Vienna Convention in other pending cases, including those of the 50 other Mexican nationals addressed in the ICJ's *Avena* decision.

Second, U.S. courts and practitioners need the guidance that only Supreme Court review would provide. The uncertain status of the law surrounding the application of the Vienna Convention in the courts of this country is evidenced by the substantial number of federal decisions and state cases that have generated petitions for *certiorari*, all without success, over the past six years. Moreover, the lower courts have issued many calls for Supreme Court guidance, most notably in *Medellin* itself. *See Medellin*, 371 F.3d at 280 ("We are bound to follow the precedent [*i.e.*, the Supreme Court's *Breard* decision] until *taught otherwise* by the Supreme Court") (emphasis added). *See also United States v. Ortiz*, 315 F.3d 873, 886 (8th Cir. 2002), *cert. denied sub nom. Tello v. United States*, 538 U.S. 1042 (2003) ("The Supreme Court has not directly addressed the issue" of individual rights); *United States v. Emuegbunam*, 268 F.3d 377, 391 (6th Cir. 2001), *cert. denied*, 535 U.S. 977 (2002) ("Confronted in recent years with numerous claims based upon the Vienna Convention without the benefit of a definitive statement from the Supreme Court . . ."); *State v. Navarro*, 659 N.W.2d 487, 493 (Wis. Ct. App.), *rev. denied*, 661 N.W.2d 101 (Wis. 2003); *Rocha v. State*, 16 S.W.3d 1, 19 (Tex. Crim. App. 2000) ("The effect of a treaty and the consequences of its violation are ultimately federal questions that only the United States Supreme Court can finally and definitively answer."). Even members of this Court have called for such review. *See Torres v. Mullin*, 157 L.Ed. 2d 454, 458 (2003) (Breyer, J., dissenting) ("Given the international implications of the issues raised, I believe further information, analysis, and consideration are necessary.").

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[4] The *Avena* judgment eliminates any concerns about a premature *certiorari* petition based on provisional measures orders from the ICJ. The instant Petition thus contrasts sharply with the procedural posture of *Torres v. Mullin*, 157 L.Ed. 2d 454, 458 (2003) (Breyer, J., dissenting) ("Depending on how the ICJ decides Mexico's related case against the United States . . . I may well vote to grant *certiorari* in this case."). Nor does the case present the problem associated with what, until 2001, was the uncertain legal status of whether ICJ provisional measures orders had binding effect. *See Federal Republic of Germany v. United States*, 526 U.S. 111, 112-13 (1999) (Breyer, J., dissenting joined by Stevens, J.) ("'[A]n order of the International Court of Justice indicating provisional measures is not binding and does not furnish a basis for judicial relief.'" (quoting letter from Solicitor General filed Mar. 3, 1999, with Clerk of Supreme Court)); *id.* at 112 (Souter, J., concurring joined by Ginsburg, J.) (stating "[we] have taken into consideration the position of the Solicitor General on behalf of the United States"). In its final judgment in *LaGrand*, the ICJ determined, contrary to the position previously advanced by the United States, that ICJ provisional measures orders are legally binding. *LaGrand*, para. 109, 110.

Finally, further consideration of these Vienna Convention issues in the lower courts would not be beneficial. The lower courts have repeatedly staked out positions contrary to *LaGrand* and now the Fifth Circuit has done so as well with respect to *Avena*.[5] Thus, little is likely to change in light of *Avena* absent action by this Court. Nor is it likely the ICJ's interpretation of the Vienna Convention will change; indeed, *Avena* confirms that it will not.

In sum, judicial review is necessary by the Supreme Court to address a host of critical issues that have profound national and international implications – to address whether the Vienna Convention confers individual rights, to determine whether and in what circumstances the procedural default doctrine is ever applicable to Vienna Convention claims, to establish what an appropriate prejudice standard is, and to resolve what remedies are warranted for proven Vienna Convention violations.

II. THE FIFTH CIRCUIT ERRED BY FAILING TO FOLLOW THE BINDING RULE OF LAW ESTABLISHED IN *AVENA*.

On May 20, 2004, the Court of Appeals for the Fifth Circuit denied Petitioner's request for a certificate of appealability that had been previously denied by the U.S. District Court for the Southern District of Texas. *See Medellin v. Dretke*, 371 F.3d 270 (5th Cir. 2004). Both courts acknowledged a Vienna Convention violation but declined to provide a remedy. This was error.

The Fifth Circuit's decision directly contradicts the *Avena* final judgment that mandates specific relief in Mr. Medellin's case. Among other errors, the Fifth Circuit: (1) failed to correct the lower court's use of the procedural default rule; and (2) failed to acknowledge that the Vienna Convention creates individually enforceable rights. To be faithful to *Avena*, the Fifth Circuit was obligated to order the lower court to engage in review and reconsideration of Petitioner's case that would fully consider whether the Vienna Convention violations impaired the fairness of his underlying conviction and sentence. *See Avena*, para. 138. The Fifth Circuit's utter disregard for *Avena's* key holdings warrants granting *certiorari* so that this Court may correct these manifest errors of law that have had a fundamental impact on Mr. Medellin's case and on the cases of other foreign nationals on death row in the United States. This review will also provide the Court with the opportunity to clarify the appropriate prejudice standard to apply when considering Vienna Convention violations.

In sum, the Fifth Circuit's refusal to grant a certificate of appealability to address the lower court errors concerning the Vienna Convention violations in Mr. Medellin's case merits Supreme Court review. A grant of *certiorari* would provide this Court with a needed opportunity to clarify the status of the law and would ensure U.S. compliance with its legal obligations. *See Marbury v. Madison*, 5 U.S. 137, 177 (1803).

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[5] In *Torres v. Oklahoma*, however, the Oklahoma Court of Criminal Appeals concluded that prior precedent cannot control in the case of a Mexican national subject to the *Avena* judgment. *See Torres v. Oklahoma*, No. PCD-04-442 (Okla. Crim. App. May 13, 2004) (attached at Petitioner's Appendix 142A-163A). The *Torres* decision provides a further basis to grant review to resolve the conflict between the Oklahoma court and the Fifth Circuit over the degree to which *Avena* binds U.S. courts faced with violations of Article 36 of the Vienna Convention.

III. FEDERAL AND STATE COURTS HAVE FAILED IN THEIR CONSTITUTIONAL DUTY TO UPHOLD THE RULE OF LAW IN CASES INVOLVING THE VIENNA CONVENTION.

A. The United States Agreed To Be Legally Bound By The Vienna Convention And The Optional Protocol.

Over 30 years ago, the United States, through the power granted to its Executive and Legislative branches of government by the United States Constitution, made the policy choice to sign and ratify the Vienna Convention, making it and its attendant provisions the supreme law of the land. *See* U.S. Const. art. II, § 2, cl. 2 & art. VI, cl. 2. The Vienna Convention provides that foreign nationals must be informed of their right to communicate with consular officials when they are arrested or detained in any manner. Vienna Convention, art. 36, para. 1. It also requires that competent authorities notify the appropriate consulate if the foreign national so requests. *Id.* Finally, it entitles consular officials to visit their nationals, to communicate with them, and to arrange for their legal representation. *Id.* Thus, the Vienna Convention serves two broad goals. Through consular assistance, foreign nationals can gain a greater awareness of the nature and scope of the legal proceedings that affect them. At the same time, consular assistance allows foreign governments to monitor the safety and fair treatment of their nationals in such proceedings.

Significantly, the United States has also signed and ratified the Optional Protocol to the Vienna Convention. By doing so, it recognized that the ICJ's "interpretation or application of the Convention" is authoritative. Optional Protocol, Preamble; art. I. Moreover, under Article 94 of the United Nations Charter, the United States also has

agreed to comply with ICJ decisions in cases to which it is a party. United Nations Charter, *opened for signature* June 26, 1945, art. 94, 59 Stat. 1031, T.S. No. 993.

Under international law, the implications of U.S. ratification of the Vienna Convention and the Optional Protocol are significant. Specifically, the United States has a binding legal obligation to comply with the Vienna Convention and the ICJ's decision in *Avena*.

B. The United States Has A Long History Of Promoting Respect For The Rule Of Law.

Review by this Court is necessary to demonstrate that the United States continues to take its international legal obligations seriously. Regardless of how this Court resolves the merits of Petitioner's case, it would send a damaging message overseas were this Court to decline even to review a judgment of a federal appellate court that is in direct conflict with a binding decision of the ICJ. In our federal system, it is plainly the function of this Court to interpret federal law, including treaties, and to ensure compliance by state officials. *See* U.S. Const. art III, § 2, cl. 2 (the "judicial Power shall extend to all . . . Treaties made . . ."); *id.*, art. VI, cl. 2 ("[A]ll Treaties made . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding"); *Marbury*, 5 U.S. at 177; *Cooper v. Aaron*, 358 U.S. 1, 18-19 (1958).

Throughout its history, the United States has consistently asserted that violations of international law have serious consequences for international order. The United States has also promoted respect for international law because it reflects important American values. It is expected, therefore, that the United States will be a leader in complying with the obligations of the Vienna Convention and the Optional Protocol.

Regrettably, this has not occurred. Review in this case, therefore, is warranted so that the Supreme Court may uphold the rule of law and "the supreme Law of the Land." In so doing, the Court will also demonstrate to "the [ICJ] and the world that the United States does indeed take its international law responsibilities seriously." William Howard Taft IV, U.S. Department of State, Legal Adviser, *Remarks to National Association of Attorneys General*, at 1 (available at: http://usinfo.state.gov).

C. Federal And State Courts Have Repeatedly Failed To Provide Meaningful Review and Relief For Vienna Convention Violations.

Despite this country's deep commitment to the rule of law, federal and state courts in this country have failed to provide meaningful review and relief for repeated and undisputed violations of the Vienna Convention. In doing so, they have implicitly relied upon, or expressly cited to, this Court's 1998 *per curiam* opinion in *Breard*. Conversely, they have all but ignored the ICJ's subsequent decision in *LaGrand*. And, as demonstrated by Petitioner's case, *Avena* is subject to a similar fate absent intervention by the Court. The failure of U.S. courts to abide by ICJ decisions has led to substantial conflict between the ICJ and American courts, leaving uncertain the rule of law regarding the Vienna Convention in this country. The Supreme Court's repeated denial of *certiorari* in cases where Vienna Convention issues were raised below has only contributed to this uncertainty. Review by the Court is necessary to resolve the conflict and to answer the important and recurring legal questions raised by this case.

1. The Supreme Court's *Breard per curiam* opinion.

More than six years ago, this Court denied the petition for a writ of *certiorari* of Angel Francisco Breard, who was seeking relief from his death sentence on the grounds of Article 36 Vienna Convention violations. *See Breard*, 523 U.S. at 373, 378-379.[6] *Breard*, which was rendered before the ICJ had spoken on the interpretation of the Vienna Convention, has created confusion in the lower courts.

In stating that Breard procedurally defaulted his claim, this Court expressed the general view that Article 36(2) of the Vienna Convention does not bar the application of procedural default rules to Convention claims. *Id.* at 375. The Court noted that the application of American procedural default rules was permissible "absent a clear and express statement to the contrary." *Id.* Moreover, the Court observed that (at least at that point in time) such procedural default rules could theoretically be harmonized with the language of the Vienna Convention itself so long as they allow "'full effect to be given to the purposes for which the rights accorded under'" Article 36 of the Convention were intended. *Id.* at 375 (citing Article 36(2), [1970], 21 U.S.T. at 101).[7]

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[6] In *Breard*, the Court also denied Paraguay's petition for writ of *certiorari* that argued its rights under the Vienna Convention were violated as a result of Breard's conviction. Additionally, the Court denied Breard's petition for an original writ of *habeas corpus*, Paraguay's motion for leave to file a bill of complaint, and the accompanying stay applications of both Breard and Paraguay. *Breard*, 523 at 378-379.

[7] The Court also stated that Breard's claim was procedurally barred by observing that the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), enacted long after the Vienna Convention became effective in the United States, precluded federal habeas review of

When it rendered its *Breard* decision, however, the Supreme Court did not have the benefit of a final ICJ merits judgment concerning the nature and scope of the Vienna Convention and its attendant obligations.

2. The ICJ's *LaGrand* and *Avena* decisions.

In 1999, Germany instituted proceedings before the ICJ against the United States, alleging violations of the Vienna Convention in the case of two German nationals who had been sentenced to death in Arizona.[8] One of the two German nationals was executed prior to the issuance of the ICJ's provisional measures order. While the ICJ subsequently issued a provisional measures order requesting that the United States delay the execution of the second German national pending its final resolution of the case, it did not rule on the merits of the underlying claim at that time.[9]

Breard's conviction and sentence. *See Breard*, 523 U.S. at 376. The Fifth Circuit did not rely on the AEDPA in its ruling. In any event, no AEDPA bar could apply in this case because Petitioner Medellin raised his Vienna Convention claim in state post-conviction proceedings, filed a supporting affidavit, and requested an evidentiary hearing, which the state court denied. *See* Petition for Writ of Certiorari at 21, *Medellin v. Dretke*, --- U.S. --- (2004) (No. 04-5928).

[8] Walter and Karl LaGrand were German nationals who, like Mr. Medellin here, were never informed of their right to communicate with their country's consular officials, either when they were arrested and charged with capital murder or when they were sentenced to death. *LaGrand*, para. 15.

[9] When this provisional measures order was issued, it was unclear whether such orders were legally binding. The ICJ would subsequently rule on the binding nature of its provisional measures orders in its merits ruling in *LaGrand*.

Before the ICJ had completed its consideration of the merits of the underlying claim, the Supreme Court, again in a *per curiam* decision, denied Germany's eleventh hour motion for leave to file a bill of complaint and motion for preliminary injunction to delay the execution of Walter LaGrand. *See Federal Republic of Germany v. United States*, 526 U.S. 111 (1999) (per curiam). LaGrand was executed following this Court's denial of Germany's request for relief.

On June 27, 2001, the ICJ issued its final judgment in *LaGrand*. The Court found that the United States had violated the Vienna Convention. *LaGrand*, para. 73. Among its holdings, the ICJ held Article 36(1)(b) creates and confers individual rights to consular notification for detained nationals, and does not simply accord rights to the sending State. *Id.*, para. 77, 91. The ICJ also made clear that a prejudice inquiry is irrelevant for determining the threshold issue of whether there has been a Vienna Convention violation. *Id.*, para. 72-74. It further held that the United States failed to carry out its obligations under the Vienna Convention when it applied the "procedural default" doctrine to preclude courts from giving full effect to the right of consular access. *Id.*, para. 91.

LaGrand establishes that procedural default rules cannot interfere with the obligation of states to give "full effect to the purposes" of the Vienna Convention. This portion of the ICJ's ruling "undermin[es] a major premise" of the Court's *per curiam* decision in *Breard*.[10] *See Madej*

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[10] The rationale for the ICJ's holding is simple: the United States cannot shift to the foreign national the consequences of its own violation. *See Torres*, 157 L.Ed. 2d at 455 (2003) (Stevens, J., dissenting) ("Applying the procedural default rule in Article 36 claims . . . is manifestly unfair . . . [because] . . . a foreign national who is presumptively ignorant of his right to notification should not be

v. Schomig, 223 F. Supp. 2d 968, 979 (N.D. Ill. 2002); *cf. Breard*, 523 U.S. at 375. Regarding remedies, the ICJ held that, for individuals subject to prolonged detentions or convicted and sentenced to severe penalties, "it would be incumbent upon the United States to allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in the Convention" and that "an apology is not sufficient." *LaGrand*, para. 123, 125.

Three years later, the ICJ revisited the Vienna Convention in an action filed by Mexico against the United States and removed any doubt about the legality of the U.S. conduct. In *Avena*, the ICJ held that the United States violated the Vienna Convention in Mr. Medellin's case as well as in the cases of 50 other Mexican nationals. *See Avena*, para. 153. To remedy these violations, the ICJ ruled that the United States must provide "by means of its own choosing, review and reconsideration of the convictions and sentences of the Mexican nationals" and take into account the rights set forth in Article 36 as well as relevant portions of the *Avena* judgment. *Id.*, para. 153(9). The ICJ specified that review and reconsideration must be effective and provide "a procedure which guarantees that full weight is given to the violation of the rights set forth in the Vienna Convention, whatever may be the actual outcome of such review and reconsideration." *Id.*, para. 139. The ICJ also reaffirmed that the procedural default rule cannot be used to preclude a defendant from raising a Vienna Convention violation. *Id.*, para. 134. Application of procedural default rules would effectively nullify the right to review and reconsideration as mandated by the ICJ.

The ICJ stated, moreover, that "the judicial process" is best suited to undertake review and reconsideration. *Id.*, para. 140. The ICJ emphasized that the executive clemency process is "not sufficient in itself to serve as an appropriate means of 'review and reconsideration.'" *Id.*, para. 143. It is, therefore, the responsibility of the courts to ensure meaningful review and reconsideration. Finally, the ICJ stated that its conclusions not only applied to the cases of the Mexican nationals before it but also to the cases of other foreign nationals subject to similar situations in the United States. *Id.*, para. 151.

3. Federal and state courts have relied on *Breard* to disregard *LaGrand* and *Avena*.

Given this Court's admonition in *Breard*, that "we should give respectful consideration to the interpretation of an international treaty rendered by an international court with jurisdiction to interpret such," 523 U.S. at 375, it is clear that *LaGrand* and *Avena* have significantly altered the legal landscape since this Court last spoke on these issues. But in the absence of more definitive guidance from this Court, the lower courts have continued to rely on *Breard*, despite its lack of precedential value, as the Fifth Circuit erroneously has done in Petitioner's case. *See* discussion *supra* Part II. As a result, the lower courts remain uncertain about, or simply ignore, the impact of the ICJ's decisions in *LaGrand* and *Avena*.

It is well-settled that, to the extent *Breard* is a decision denying *certiorari*, it lacks precedential value. *See Teague v. Lane*, 498 U.S. 288, 296 (1989); *Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 919 (1950); *United States v. Carver*, 260 U.S. 482, 490 (1923). Moreover, *Breard* was not derived from full briefing, argument, consideration,

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deemed to have waived the Article 36 protections [he does not know about] simply because he failed to assert that right in a state criminal proceeding.").

or deliberation, *see Breard*, 523 U.S. at 379-81 (Stevens, J. and Breyer, J., dissenting), and thus is a less than solid precedent in other respects as well. *See Hohn v. United States*, 524 U.S. 236, 251 (1998) ("We have felt less constrained to follow precedent where . . . the opinion was rendered without full briefing or argument."). Nonetheless, the lower federal and state courts have consistently relied on *Breard* to disregard the ICJ's opinions in *LaGrand* and *Avena*.

A review of the case law reveals substantial conflict between U.S. courts and the ICJ on the nature and scope of the Vienna Convention. *See Torres*, 157 L.Ed. 2d at 455 (Stevens, J., respecting denial of *certiorari*) ("There is obvious tension between the holding in *Breard* and the purpose of Article 36 of the Vienna Convention" as interpreted by the ICJ.). Relying on *Breard*, several federal circuits have sidestepped the question of whether the Vienna Convention creates judicially enforceable individual rights, choosing either not to reach the question, or merely assuming an answer without deciding the issue. Such courts have rationalized their approach by concluding that deciding the issue was not necessary to their ultimate case disposition. *See, e.g., Ortiz*, 315 F.3d at 886-87; *United States v. Minjares-Alvarez*, 264 F.3d 980, 987-88 (10th Cir. 2001); *United States v. Lawal*, 231 F.3d 1045, 1048 (7th Cir. 2000), *cert. denied*, 531 U.S. 1182 (2001); *United States v. Chaparro-Alcantara*, 226 F.3d 616, 621 (7th Cir.), *cert. denied*, 531 U.S. 1026 (2000); *United States v. Lombera-Camorlinga*, 206 F.3d 882, 884-85 (9th Cir.) (en banc), *cert. denied*, 531 U.S. 991 (2000).

Several federal circuits and some state courts have either held, or at least intimated, that the Vienna Convention does not create individual rights, thus directly conflicting with the ICJ's interpretation of the treaty. These courts have relied upon a variety of distinct theories: the presumption against private rights under international treaties; the contention that the Vienna Convention does not explicitly create individual rights and is ambiguous on that question; the assertion that the Convention's ratification and legislative history do not support a finding of individual rights; the historical position of the executive branch of the United States that the Convention does not create individual rights; the assertion that other countries do not recognize such rights or provide a remedy in their criminal justice systems; and the argument that this Court has not allowed even signatory nations to the Convention to pursue actions. *See, e.g., United States v. Duarte-Acero*, 296 F.3d 1277, 1281-82 (11th Cir.) (suggesting that Vienna Convention may not create individual rights), *cert. denied*, 537 U.S. 1038 (2002); *United States v. De La Pava*, 268 F.3d 157, 164-65 (2d Cir. 2001) (same); *Emuegbunam*, 268 F.3d at 394 (concluding that Vienna Convention does not create individual rights); *United States v. Jimenez-Nava*, 243 F.3d 192, 198 (5th Cir.) (same), *cert. denied*, 533 U.S. 962 (2001); *United States v. Li*, 206 F.3d 56, 60-66 (1st Cir.) (*en banc*) (suggesting that Vienna Convention may not create individual rights), *cert. denied*, 531 U.S. 956 (2000). *See also Bell v. Commonwealth*, 563 S.E.2d 695, 706 (Va. 2002), *cert. denied*, 537 U.S. 1123 (2003) (concluding *LaGrand* did not hold that Article 36 creates legally enforceable individual rights); *State v. Navarro*, 659 N.W.2d 487, 493 (Wis. Ct. App.) (same), *rev. denied*, 661 N.W.2d 101 (Wis. 2003); *State v. Martinez-Rodriguez*, 33 P.3d 267, 274 (N.M. 2001) (concluding that Vienna Convention does not create individual rights), *cert. denied*, 535 U.S. 937 (2002).

Still other U.S. courts have continued to use the procedural default doctrine to avoid reaching the merits of Vienna Convention claims, notwithstanding the ICJ's clear holdings on this issue after *Breard*. These courts include the Fifth Circuit in this very case.[11] *See Medellin*, 371 F.3d at 279-80. *See also Gulertekin v. Tinnelman-Cooper*, 340 F.3d 415, 425-26 (6th Cir. 2003); *Valdez v. State*, 46 P.3d 703, 706-10 (Okla. Crim. App. 2002).

U.S. courts have also relied on *Breard* to bar meaningful review and reconsideration – even in cases of undisputed Vienna Convention violations – by requiring, as a *procedural* prerequisite to obtaining such review, a preliminary demonstration of prejudice, such as proof that the violations impacted the outcome of a trial or deprived a defendant of a federal constitutional right. *See, e.g., Ortiz*, 315 F.3d at 878; *Minjares-Alvarez*, 264 F.3d at 987; *United States v. Chanthadara*, 230 F.3d 1237, 1256 (10th Cir. 2000), *cert. denied*, 534 U.S. 992 (2001); *United States v. Cordoba-Mosquera*, 212 F.3d 1194, 1196 (11th Cir. 2000), *cert. denied sub nom. Arnulfo Zuniga v. United States*, 531 U.S. 1131 (2001); *United States v. Pagan*, 196 F.3d 884, 890 (7th Cir. 1999), *cert. denied*, 530 U.S. 1283 (2000); *United States v. Ademaj*, 170 F.3d 58, 67-68 (1st Cir.), *cert. denied*, 528 U.S. 887 (1999); *Bell*, 563 S.E.2d at 707. Such rulings contradict the ICJ, which has held that, for undisputed Vienna Convention violations, a showing of prejudice is *not* a prerequisite to obtaining the threshold *procedural* relief of review and reconsideration. *See LaGrand*, para. 72-74, 125.

Finally, notwithstanding that this Court left open the possibility that in certain cases a Vienna Convention violation could lead to "overturning of a final judgment of conviction," *Breard*, 523 U.S. at 377, lower courts have routinely held that dismissals of indictments and suppression of evidence or confessions are not permissible remedies. *See, e.g., Ortiz*, 315 F.3d at 886-87; *Duarte-Acero*, 296 F.3d at 1281-82; *De La Pava*, 268 F.3d at 165; *Emuegbunam*, 268 F.3d at 390-91; *Minjares-Alvarez*, 264 F.3d at 985-87; *Jimenez-Nava*, 243 F.3d at 198-200; *Lawal*, 231 F.3d at 1048-49; *Lombera-Camorlinga*, 206 F.3d at 885-88; *Li*, 206 F.3d at 60; *Conde v. State*, 860 So. 2d 930, 953 (Fla. 2003), *cert. denied, Conde v. Florida*, 124 S. Ct. 1885 (2004); *Commonwealth v. Diemer*, 785 N.E.2d 1237, 1245 (Mass. App. Ct. 2003), *cert. denied*, 124 S. Ct. 1144 (2004); *Bell*, 563 S.E.2d at 707. As *Avena* recently clarified, while some showing of prejudice may be required to obtain *substantive* relief, what is crucial in the review and reconsideration process is the existence of "a procedure which guarantees that full weight is given to the violation of the rights set forth in the Vienna Convention, *whatever* may be the actual *outcome* of such review and reconsideration." *Avena*, para. 121, 139 (emphasis added).

CONCLUSION

For the foregoing reasons, the Supreme Court should grant Mr. Medellin's petition for a writ of *certiorari*.

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[11] Indeed, the Petitioner's case also reveals how courts continue to rely on outdated interpretations of the Vienna Convention. In *Medellin*, the Fifth Circuit relied on its decision in *United States v. Jimenez-Nava*, 243 F.3d 192 (5th Cir. 2001), to conclude that Article 36 of the Vienna Convention confers no individually enforceable rights "until either the Court [*i.e.*, the Fifth Circuit] sitting *en banc* or the Supreme Court say otherwise." *Medellin*, 371 F.3d at 280. In *Jimenez-Nava*, the Fifth Circuit relied on a First Circuit case, *United States v. Li*, 206 F.3d 56 (1st Cir. 2000), as well as the State Department's interpretation of the Vienna Convention that was submitted in *Li*. *See Jimenez-Nava*, 243 F.3d at 197. But the State Department's interpretation of the Vienna Convention can no longer be viewed as persuasive or even up-to-date since it was issued prior to the ICJ's opinions in both *LaGrand* and *Avena*.

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APPENDIX

APPENDIX

List of *Amici Curiae*

Bar Associations

Association of the Bar of the City of New York

The Association of the Bar of the City of New York ("the Association") is a professional association of more than 22,000 attorneys from nearly every state and more than 50 countries. Much of the Association's work is accomplished through approximately 170 committees. One of these is dedicated to issues related to capital punishment. This attention to the death penalty reflects the fact that the justice system can do nothing more consequential than to take a life. The Association is committed to the rule of law on the national and international landscape and to the principle that if the death penalty is applied, it must be applied in a fair and impartial manner. Thus, the Association has long been concerned with capital punishment and its application. The Association has taken the lead in the analysis of practical and legal issues relating to the death penalty. *See, e.g.*, Committee on Capital Punishment Panel Presentation, *Capital Punishment in the Age of Terrorism*, 41 CATH. LAW. 187 (2003); Committee on Capital Punishment, *Dying Twice: Conditions On New York's Death Row*, 22 PACE L. REV. 347 (Spring 2002) (also at 56 Record Assoc. Bar N.Y. 358); Committee on Capital Punishment, *The Pataki Administration's Proposals to Expand the Death Penalty*, 55 RECORD ASSOC. BAR N.Y. 129 (2000); Committee on Civil Rights, *Legislative Modification of Habeas Corpus in Capital Cases*, 44 RECORD ASSOC. BAR N.Y. 848 (1989); Committee on Civil Rights, *The Death Penalty*, 39 RECORD ASSOC. BAR N.Y. 419 (1984).

Hispanic National Bar Association

The Hispanic National Bar Association ("HNBA") is an incorporated, non-profit, national association representing the interest of over 25,000 Hispanic American attorneys, judges, law professors, and law students in the United States and Puerto Rico. The HNBA serves Hispanic attorneys, judges, law professors and law students, providing a forum for the exchange of ideas, the administration of justice and the promotion of integration of Hispanics in the study, practice, instruction and adjudication of law.

Mexican American Bar Association

The Mexican American Bar Association ("MABA") was established in 1959 as a legal organization committed to helping the Latino community. Its mission is the advancement of Latinos in the legal profession and the empowerment of the Latino community through service and advocacy. Today, MABA is one of the largest and most prominent legal associations in the nation. MABA members include over 700 lawyers, judges, politicians, and business people of various ethnic backgrounds, serving in their respective fields of law and holding prominent positions of leadership in local, state and federal government. MABA is committed to promoting respect for the rule of law and the application of the law to all people.

National Association of Criminal Defense Lawyers

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit corporation with more than 11,400 members nationwide and 28,000 affiliate members in 50 states, including private criminal defense attorneys, public defenders, and law professors. The American Bar Association recognizes the NACDL as an affiliate

organization and awards it full representation in the ABA's House of Delegates. NACDL was founded in 1958 to promote criminal-law research, to advance and disseminate knowledge in the area of criminal practice, and to encourage integrity, independence, and expertise among criminal-defense counsel. NACDL is particularly dedicated to advancing the proper, efficient, and just administration of justice, including issues involving the death penalty. In furtherance of this and other objectives, the NADCL files approximately 35 *amicus curiae* briefs each year, in this Court and others, addressing a wide variety of criminal-justice issues.

Human Rights and Civil Rights Organizations

Amnesty International

Amnesty International USA is the U.S. section of Amnesty International, a Nobel Prize-winning organization with more than 1.8 million members, supporters and subscribers in over 150 countries and territories throughout the world. Amnesty International's mission is to undertake research and action focused on preventing and ending grave abuses of the rights to physical and mental integrity, freedom of conscience and expression, and freedom from discrimination, within the context of its work to promote all human rights. Amnesty International is privately funded and is independent of any political ideology or economic interest. In line with the organization's international focus, Amnesty International USA joins this brief on matters of international law.

Human Rights First

Since 1978, Human Rights First (formerly the Lawyers Committee for Human Rights) has worked in the United States and abroad to create a more secure and humane world by advancing justice, human dignity, and respect for the rule of law. It protects refugees in flight from persecution and repression and in seeking legal relief in the United States; works to ensure that domestic legal systems incorporate stronger human rights protections; helps build a stronger international system of justice and accountability for the worst human rights crimes; works with and supports human rights activists who fight for basic freedoms and peaceful change at the national level; and promotes fair economic practices through stronger safeguards for workers' rights. Human Rights First has filed numerous amicus briefs before the U.S. Supreme Court and other U.S. courts and international bodies, and believes this case presents compelling issues of justice for victims of human rights violations.

Human Rights Watch

Human Rights Watch ("HRW") is a non-profit organization established in 1978 that investigates and reports on violations of fundamental human rights in over 70 countries worldwide with the goal of securing the respect of these rights for all persons. It is the largest international human rights organization based in the United States. By exposing and calling attention to human rights abuses committed by state and non-state actors, HRW seeks to bring international public opinion to bear upon offending governments and others and thus bring pressure on them to end abusive practices. HRW has filed amicus briefs before various bodies, including U.S. courts and international tribunals.

League of United Latin American Citizens

The League of United Latin American Citizens ("LULAC") is the largest and oldest Hispanic civil rights organization in the United States. With over 115,000

members in virtually every state of the nation, LULAC advances the economic condition, educational attainment, political influence, health and civil rights of Hispanic Americans. For more than 75 years, LULAC's members have sought to ensure the civil rights of Hispanics throughout the United States, and foster respect for the rule of law. We believe in the democratic principal of individual freedom and are obligated to promote, protect and assure the constitutional and statutory rights of all Hispanics, regardless of immigration status.

Mexican American Legal Defense and Educational Fund

The Mexican American Legal Defense and Educational Fund ("MALDEF") is a national civil rights organization established in 1968. Its principal objective is to secure, through litigation, advocacy, and education, the civil rights of Latinos living in the United States. MALDEF has litigated numerous cases in the area of immigrants' rights since the organization's founding. Preserving the constitutional due process rights of immigrants is a primary goal of MALDEF's Immigrants' Rights program.

Minnesota Advocates for Human Rights

Minnesota Advocates for Human Rights ("Minnesota Advocates") is a volunteer-based non-profit organization committed to the impartial promotion and protection of international human rights standards and the rule of law. Minnesota Advocates conducts a broad range of innovative programs to promote human rights in the United States and around the world, including human rights monitoring and fact finding, direct legal representation, education and training, and publications. Minnesota Advocates has produced more than 50 reports documenting human rights practices in more than 25 countries; educated more than

10,000 students and community members on human rights issues; and provided legal representation to thousands of low-income individuals. Minnesota Advocates' Death Penalty Project was organized in 1991 to recruit Minnesota attorneys to assist death row inmates with their post-conviction appeals. Minnesota Advocates' volunteers have provided *pro bono* representation to dozens of death row inmates in 10 states. In addition to working to protect the rights of capital defendants in death penalty states, the project provides education on death penalty issues and actively advocates for the elimination of the death penalty in the United States. Minnesota Advocates has previously submitted *amicus curiae* briefs in numerous cases, including to the Inter-American Court of Human Rights concerning the request of the government of Mexico for an advisory opinion related to a Mexican national on death row in the United States.

(4)

No. 04-5928

Supreme Court, U.S.
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In The Supreme Court of the United States

JOSE ERNESTO MEDELLIN,

Petitioner,

v.

DOUG DRETKE, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF AMICI CURIAE THE EUROPEAN UNION AND MEMBERS OF THE INTERNATIONAL COMMUNITY IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

The European Union (EU) considers the respect for treaty based rights to be of vital importance both nationally and within the international community. This principle is common to its twenty-five Member States: Austria, Belgium, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden, and the United Kingdom. Like the United States, all EU Member States are party to the Vienna Convention on Consular Relations (VCCR).[2] Article 36 of the VCCR (Article 36) confers both individual and State rights. As such, the EU has an interest in securing compliance with rights guaranteed under Article 36. This position has been expressed to the Government of the United States through specific demarches in cases involving individual foreign nationals who have been deprived of their rights under Article 36.[3]

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[1] In accordance with Supreme Court Rule 37.6, *amici* represent that no party other than *amici* and counsel for *amici* authored this brief in whole or in part, and no person or entity, other than *amici* and counsel, have made a monetary contribution to the preparation or submission of this brief. Global consent letters from both parties for all *amicus curiae* briefs are on file with the Clerk of the Court. Counsel acknowledge the valuable coordination and research for this project from Anne James, Executive Director and Joanne Cecil, Project Assistant, International Justice Project.

[2] *Opened for signature* Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261.

[3] Demarches in the cases of foreign nationals were transmitted in each of the following: Javier Suarez Medina, Texas (Mexican), 23 July, 2002; Hung Thanh Le, Oklahoma (Vietnamese), 4 December, 2003; Gerardo Valdez, Oklahoma (Mexican), 13 July, 2001; Osvaldo Torres, Oklahoma (Mexican) 30 April, 2004. All these communications can be found on the Internet, *EU Policy and Action on the Death Penalty*, *at* http://www.eurunion.org/legislat/DeathPenalty/deathpenhome.htm#ActiononUSDeathRowCases. See, also European Union, *Guidelines to EU*

As nations committed to the rule of law, the Member States of the EU have a fundamental interest in compliance with international instruments, particularly when the rights of a Member State's national may be in the balance.

The EU believes that it can provide this Court with a special and unique perspective that is not available through the views of the parties.

The Council of Europe,[4] Iceland, Liechtenstein, Norway and Switzerland have explicitly expressed to the European Union and its Member States their shared interest as *amici* and their support for the arguments put forward in the present brief.

The positions taken in the following arguments, while expressed as those of the European Union, are shared by all signatories to the brief.

SUMMARY OF ARGUMENT

Article 36 confers on detained foreign nationals a right to be informed, without delay, by the arresting authority, of the right to contact consular officers of the Sending State. The right to be so informed is an individual right (as well as a right accorded to the Sending State). If the foreign national is convicted without being informed of the rights under Article 36, that individual must be allowed to apply to a court in order to challenge the conviction and sentence by claiming, in reliance on Article 36 (1), that the competent authorities failed to comply with their obligations to provide the requisite consular information.

Policy Towards Third Countries on the Death Penalty (June 3, 1998), Part III(v) *at*
http://www.eurunion.org/legislat/DeathPenalty/Guidelines.htm.

[4] The Council of Europe is composed of 45 Member States: Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia & Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, San Marino, Serbia and Montenegro, Slovakia, Slovenia, Spain, Sweden, Switzerland, The Former Yugoslav Republic of Macedonia, Turkey, Ukraine, and the United Kingdom.

Courts must conduct such a review even if their procedural rules, such as those relating to default of claims, would otherwise preclude review. These propositions have been affirmed by the International Court of Justice (ICJ).[5] Furthermore, the right to consular access is a right protected under customary international law and must therefore be observed.

ARGUMENT

I. THE VIENNA CONVENTION ON CONSULAR RELATIONS IS A KEY FORM OF PROTECTION FOR FOREIGN NATIONALS

The VCCR, a product of the Conference on Consular Relations convened by the United Nations General Assembly in 1963, is a global multilateral treaty that governs consular relations and regulates many aspects of the relationship of foreign consuls to a host Government. The VCCR has been ratified by 165 States (including the United States on November 24, 1969) and is the cornerstone of international consular relations.[6] Its conclusion is regarded as "the single most important event in the history of the consular institution. Indeed, after 1963, there can be no settlement of consular disputes or regulation of consular relations, whether by treaty or national legislation, without reference or recourse to the Vienna Convention".[7]

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[5] *LaGrand (F.R.G. v. U.S)*, 2001 I.C.J 104 (Jun. 27); *Avena and other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 128 (Mar. 31).

[6] United Nations, *Multilateral Treaties Deposited with the Secretary-*

The Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes (Optional Protocol) provides that disputes "arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice".[8]

The ICJ is "the principal judicial organ of the United Nations" (U.N.).[9] The Court's statute is annexed to the U.N. Charter; therefore, States which become members of the United Nations also become parties to the Statute.[10]

The United States[11] and Member States of the EU are party to the United Nations Charter. Respect for ICJ judgments by

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General, Vienna Convention on Consular Relations, at, http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIII/treaty31.asp.

[7] LUKE LEE, CONSULAR LAW AND PRACTICE at 26 (2d. ed. 1991).

[8] Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, *opened for signature* Apr. 24, 1963, 21 U.S.T. 325, 596 U.N.T.S. 261.

[9] U.N. Charter, *opened for signature* June 26, 1945, 59 Stat. 1031, T.S. No. 993, Article 92; Statute of the International Court of Justice, 59 Stat. 1055, T.S. No. 993.

[10] U.N. Charter, Article 93, para.1.

[11] The United States ratified the U.N. Charter on August 8, 1945. United Nations, *Multilateral Treaties Deposited with the Secretary General, Charter of the United Nations, at,* http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterI/treaty1.asp

States that are party to litigation is a basic principle of the international legal order as articulated in the United Nations Charter, Article 94: "Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party".

Article 36 recognizes the rights of consuls to communicate with and assist their nationals. Article 36 also confers specific rights on detained or imprisoned foreign nationals. As the United States Government has noted before the International Court of Justice, Article 36 "establishes rights not only for the consular officer, but perhaps more importantly for the nationals of the Sending State who are assured access to consular officers and through them to others."[12]

Article 36 requires a Receiving State to inform detained foreign nationals of their right to communicate with their consulate and to facilitate access between detained foreign nationals and consuls of the Sending State. In addition, Article 36 confers specific State rights, recognizing the right of consuls to have access to, communicate with, and assist their detained national. Further, it establishes an obligation upon the Receiving State under paragraph 1 (c) of Article 36 to enable the consular officers to arrange for legal representation of their nationals.

The significance of consular access has been expounded upon by the Inter-American Court of Human Rights (IACtHR). The IACtHR stated that "notification of the right to communicate with a consular official of his country will materially improve his possibilities of a defense," and "procedural measures, including those taken by the police, will be done with gr[illegible] for legality and greater respect for the dignity of the person."[13] The IACtHR stated that the right to be informed of the right to consular access "is a means of defense for the accused that is reflected, on occasion in a determinative way, in the respect shown for his other procedural rights".[14]

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[12] U.S. Diplomatic and Consular Staff in Tehran (*USA v. Iran*), ICJ Pleadings, at 174.

EU Member States consider consular access to be of critical importance. A foreign national faces unique disadvantages when left to navigate the foreign country's legal system in the absence of support from his home nation, even if he is represented by competent legal counsel. Article 36 reflects agreement among the States parties that foreign nationals require special assistance when they are detained on a criminal charge.

Participation by a consul provides greater assurance that a Sending State's national will understand the rights afforded by the law of the Receiving State, and correspondingly that the proceedings will be conducted as intended under the law of the Receiving State.

In a particular case, a consul may be able to assure that the accused is represented by a competent attorney who possesses a cultural understanding of the national's specific circumstances and background. Consuls may also be able to acquaint their nationals with the basic procedures under the local legal system.

Accurate translation may also be of importance. A consul may be able to assist in securing expert translation, the result of which could provide both an effective understanding by the national of his legal rights and the assurance for the arresting authority of a thorough and accurate comprehension of the national's statements.

A consul may assist in locating witnesses or documentary evidence available in the Sending State. The information thus gained may be critical in a determination of guilt, and, in the event of a conviction, in the assignment of an appropriate sentence. Consular protection is particularly important in capital cases, in which the question of life or death may be impacted by evidence of, for example, the national's health history, educational and social history, or history of public service.

II. ARTICLE 36 PROVIDES JUDICIALLY ENFORCEABLE RIGHTS

This Court has provisionally accepted in *Breard v. Greene*[15] that the VCCR confers on a foreign national a right to consular assistance following arrest. The ICJ in *LaGrand (F.R.G. v. U.S.)*, stated that Article 36 provides a right invocable by the foreign national. Article 36 provides, in part: "The said authorities shall inform the person concerned without delay of his rights under this subparagraph." The ICJ confirmed that Article 36 creates a right for a foreign national both because of this plain language, and "[m]oreover, under Article 36, paragraph 1 (c), the sending State's right to provide consular assistance to the detained person may not be exercised 'if he expressly opposed such action.' The clarity of these provisions, viewed in their context, admits of no doubt."[16]

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[13] *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, para. 121, Advisory Opinion OC-16/99, Inter-American Court of Human Rights (1999).

[14] *Id.* para 123.

[15] *Breard v. Greene*, 523 U.S. 371, 376 (1998).

[16] *LaGrand (F.R.G. v U.S.)*, 2001 I.C.J. 104 (Jun. 27), para 77.

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III. JUDICIAL REVIEW OF CONVICTION AND SENTENCE IS REQUIRED IF ARTICLE 36 IS VIOLATED

If a foreign national is convicted absent compliance with the notification obligation of Article 36, the rights of both the Sending State and the foreign national are implicated, and the conviction must be reviewed. Article 36 provides in a second paragraph: "The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended".[17]

The ICJ has addressed required remedies, first in *LaGrand* in 2001, and more recently, on March 31, 2004, in *Avena and other Mexican Nationals*.[18] In Article 36, paragraph 2, the ICJ found an obligation to allow a foreign national to seek a remedy: "The Court cannot accept the argument of the United States which proceeds, in part, on the assumption that paragraph 2 of Article 36 applies only to the rights of the sending State and not also to those of the detained individual".[19]

The ICJ held that where the notification obligation under Article 36 has not been observed, action on the criminal conviction is required: "if the United States . . . should fail in its obligation of consular notification to the detriment of German nationals, an apology would not suffice in cases where the individuals concerned have been subjected to prolonged detention or convicted and sentenced to severe penalties. In the case of such a conviction and sentence, it would be incumbent upon the United States to allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in the Convention".[20]

The ICJ subsequently affirmed in *Avena*, the requirement for review and reconsideration of a breach of Article 36 rights. The Court considered "that it is the judicial process that is suited to this task". [21] Contrary to the argument of the US, the Court stated that consideration by way of executive clemency does not suffice in view of the fact that the clemency process, as currently practiced in the US, does not appear to meet the requirements and it is therefore not sufficient in itself to serve as an appropriate means of "review and reconsideration".[22]

IV. REVIEW MUST TAKE ACCOUNT OF THE VIOLATION

Review and reconsideration is required even absent a showing that a different result would have been achieved had a consul intervened. As indicated above, a consul may act in a variety of ways in a particular case. After a person has been convicted without being informed of the right of consular access, it may be impossible to determine what impact a consul might have had on the proceedings.

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[17] VCCR, Article 36, para. 2.

[18] *Avena and other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 128 (Mar. 31).

[19] LaGrand, para. 89.

[20] *Id.* para. 125.

[21] *Id.* para. 141.

[22] *Avena*, para. 143.

Article 36, by requiring consular access, presumes that it will help a foreign national. The ICJ stated in *Avena*, "The question of whether the violations of Article 36, paragraph 1, are to be regarded as having, in the causal sequence of events, ultimately led to convictions and severe penalties is an integral part of criminal proceedings before the courts of the United States and is for them to determine in the process of review and reconsideration. In so doing, it is for the courts of the United States to examine the facts, and in particular the prejudice and its causes, taking account of the violation of the rights set forth in the Convention".[23]

V. RULES ON DEFAULT MAY NOT BE APPLIED

The ICJ ruled that treaty obligations require that rights be enforced at whatever point in time it remains possible to do so, regardless of rules on procedural default. "The problem arises," the ICJ stated, "when the procedural default rule does not allow the detained individual to challenge a conviction and sentence by claiming, in reliance on Article 36, paragraph 1, of the Convention, that the competent national authorities failed to comply with their obligation to provide the requisite consular information 'without delay,' thus preventing the person from seeking and obtaining consular assistance from the Sending State".[24] The ICJ concluded on the facts of the *LaGrand* case, "Under these circumstances, the procedural default rule had the effect of preventing 'full effect [from being] given to the purposes for which the rights accorded under this article are intended,' and thus violated paragraph 2 of Article 36".[25]

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[23] *Avena* para. 122.

[24] *LaGrand*, para. 90.

[25] *Id.* para. 91.

Expanding upon this position, the ICJ in *Avena* asserted that "[t]he crucial point in this situation is that, by the operation of the procedural default rule as it is applied at present, the defendant is effectively barred from raising the issue of the violation of his rights under Article 36 of the Vienna Convention and is limited to seeking the vindication of his rights under the United States Constitution".[26]

VI. CONSULAR ACCESS IS A RIGHT UNDER CUSTOMARY INTERNATIONAL LAW

The rights of a foreign national as provided in Article 36 are part of the corpus of customary international law. Indeed, the United States accepts that consular access is required by a customary norm and it "looks to customary international law as a basis for insisting upon adherence to the right of consular notification, even in the case of countries not party to the VCCR or any relevant bilateral agreement." Consular notification is, in the view of the United States, "a universally accepted, basic obligation…"[27]

In addition to the widespread ratification of the VCCR, the customary character of the consular access right is evidenced by its inclusion in other international instruments. International norms and standards adopted by international bodies and organizations, including the United Nations, further reflect acceptance of the necessity for full respect and observance of the right to consular access.

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[26] *Avena*, para. 134.

[27] DEPARTMENT OF STATE, CONSULAR NOTIFICATION AND ACCESS, at 44 (1998).

While the VCCR is the foundational treaty that regulates consular relations, additional treaties, including a number ratified by the United States, incorporate the principle. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment requires States to punish those who commit torture. A torture suspect who is a foreign national, "shall be assisted in communicating immediately with the nearest appropriate representative of the State of which he is a national". [28]

Furthermore, a foreign national charged with a crime against a diplomat is entitled, by virtue of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents, to consular access.[29]

Since 2000, the Organization of American States General Assembly has also enshrined these principles in the resolution on *The Human Rights Of All Migrant Workers And Their Families.*[30]

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[28] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 6 (3), G.A. Res. 39/46, [annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984)], *entered into force* June 26, 1987.

[29] Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Article 6, 28 U.S. Treaties 1977 (1973).

[30] *The Human Rights Of All Migrant Workers And Their Families*, AG/RES. 1717 (XXX-O/00) (Resolution adopted at the first plenary session, held on June 5, 2000); *The Human Rights Of All Migrant Workers And Their Families*, AG/RES. 1775 (XXXI-O/01) (Resolution adopted at the third plenary session, held on June 5, 2001); *The Human Rights Of All Migrant Workers And Their Families*, AG/RES. 1898 (XXXII-O/02) (Resolution adopted at the fourth plenary session held on June 4, 2002); *The Human Rights Of All Migrant Workers And Their Families*, AG/RES. 1928 (XXXIII-O/03), (Resolution adopted at the fourth plenary session, held on June 10, 2003); *The Human Rights Of All Migrant Workers And Their Families*, AG/RES. 2027 (XXXIV-O/04),

Various U.N. bodies have further confirmed this fundamental principle. The U.N. General Assembly has affirmed the right to consular access in a number of resolutions. The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment states that a foreign national is entitled to consular access, and to be informed of that right.[31] In addition, the Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live views consular access as a right in the event of a detention.[32]

The U.N. General Assembly has "reaffirm[ed] emphatically the duty of States parties to the Vienna Convention on Consular Relations of 1963 to ensure full respect for and observance of the Convention, in particular with regard to the right of foreign nationals, regardless of their immigration status, to communicate with a consular official of their own State in the case of detention, and the obligation of the State in whose territory the detention occurs to inform the foreign national of that right".[33]

Both the U.N. Rules for the Protection of Juveniles Deprived of their Liberty[34] and the U.N. Standard Minimum Rules for the Treatment of Prisoners[35] which provides that if a foreign

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(Resolution adopted at the fourth plenary session, held on June 8, 2004).

[31] Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 16, U.N. General Assembly Resolution 43/173 (1988).

[32] Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live, Article 10, U.N. General Assembly Resolution 40/144 (1985).

[33] Protection of Migrants, U.N. General Assembly Resolution, A/RES/58/190 (Mar. 22, 2004), para. 10.

[34] G.A. res. 45/113, annex, 45 U.N. GAOR Supp. (No. 49A) at 205, U.N. Doc. A/45/49 (1990).

[35] Standard Minimum Rules for the Treatment of Prisoners, adopted Aug.

national is arrested, the right of consular access must be respected.

Since 1999, the U.N. Commission on Human Rights has annually requested States that maintain the death penalty to adhere to the principles of consular access.[36] Most recently, in 2004, the Commission urged States to "comply fully with their international obligations, in particular with those under article 36 of the 1963 Vienna Convention on Consular Relations particularly the right to receive information on consular assistance within the context of a legal procedure, as affirmed by the jurisprudence of the International Court of Justice and confirmed in recent relevant judgments..."[37]

Since 1982, the U.N. Commission on Human Rights has appointed a Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, whose mandate has included review of those countries which still apply the death penalty. After a special mission to the United States, the only one conducted in this country, the Special Rapporteur concluded

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30, 1955, by the First U.N. Congress on the Prevention of Crime and the Treatment of Offenders, U.N. Doc. A/CONF/611, annex I, E.S.C. res. 663C, 24 U.N. ESCOR Supp. (No. 1) at 11, U.N. Doc. E/3048 (1957).

[36] U.N. Commission on Human Rights, *The Question of the Death Penalty*, 55th Sess. Resolution 1999/61, U.N. Doc. E/CN.4/RES/1999/61 (1999); U.N. Commission on Human Rights, *The Question of the Death Penalty*, 56th Sess. Resolution 2000/65, U.N. Doc. E/CN.4/RES/2000/65 (2000); U.N. Commission on Human Rights, *The Question of the Death Penalty*, 57th Sess. Resolution 2001/68, U.N. Doc. E/CN.4/RES/2001/68 (2001); U.N. Commission on Human Rights, *The Question of the Death Penalty*, 58th Sess. Resolution 2002/77, U.N. Doc. E/CN.4/RES/2002/77 (2002); U.N. Commission on Human Rights, *The Question of the Death Penalty*, 59th Sess. Resolution 2003/67, U.N. Doc. E/CN.4/RES/2003/67 (2003); U.N. Commission on Human Rights, *The Question of the Death Penalty*, 60th Sess. Resolution 2004/67, U.N. Doc. E/CN.4/RES/2004/67 (2004).

[37] *The Question of the Death Penalty*, 60th Sess., U.N. Doc. E/CN.4/RES/2004/67 (Apr. 21, 2004), para. 4(h).

"that not informing the defendant of the right to contact his/her consulate for assistance may curtail the right to an adequate defence, as provided for by the ICCPR".[38]

VII. CONCLUSION

The EU considers the implementation of the right of consular access to be of utmost importance to members of the international community. Article 36, as construed by the ICJ, requires the review and reconsideration of the conviction and sentence in the present case. When notification is omitted and a criminal conviction ensues, courts must provide a remedy. As the ICJ stated in *Avena*, "the remedy to make good these violations should consist in an obligation on the United States to permit review and reconsideration of these nationals' cases by the United States courts."[39]

In light of the international law norms articulated above, the EU, Council of Europe, Iceland, Liechtenstein, Norway and Switzerland respectfully support the position of Petitioner that *certiorari* be granted.

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[38] U.N. Commission on Human Rights, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, E/CN.4/1998/68/Add.3 (1998), para. 121.

[39] *Avena*, para. 121.

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APPENDIX

STATEMENT OF INTEREST THE COUNCIL OF EUROPE

The Council of Europe, an international organization composed of 45 European states committed to the rule of law and respect for human rights, associates itself with the amicus curiae brief submitted by the European Union in support of Mr. Jose Medellin's petition for *certiorari*.

It is of the opinion that the right of detained foreign nationals to be informed, without delay, of the right to consular access, as set out in Article 36 of the Vienna Convention on Consular Relations, is an individual right and one which is also protected under customary international law. If a foreign national is convicted without being informed of this right, that individual must be allowed to apply to a court to challenge the conviction and the sentence, in reliance on Article 36 (1). Courts must conduct such a review even if their procedural rules would otherwise preclude review.

Furthermore, it is of the opinion that respect for judgments of the International Court of Justice by States that are party to litigation is a basic requirement of the rule of law at the international level, as expressed in Article 94 of the United Nations Charter.

(1)

No. 04-5928

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Supreme Court of the United States

JOSE ERNESTO MEDELLIN,
Petitioner,
v.
DOUG DRETKE, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF FOREIGN SOVEREIGNS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER JOSE ERNESTO MEDELLIN

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INTEREST OF AMICI CURIAE[1]

The United States is a party to the Vienna Convention on Consular Relations[2] and the Convention's Optional Protocol Concerning the Compulsory Settlement of Disputes.[3] Article 36 of the Convention requires authorities who detain a foreign national to notify the detained person without delay of the right to contact consular officials and requires the authorities, if requested, to notify consular officials of the detention. The Optional Protocol grants enforcement powers to the International Court of Justice ("ICJ") and makes it the compulsory forum for resolving disputes on matters related to the Convention between nations that have adopted the Optional Protocol.

Texas authorities arrested, tried, convicted, and sentenced 18-year-old Jose Ernesto Medellin without ever providing him the notice required by Article 36, even though Medellin told those authorities, when they first arrested him, that he was born in Mexico. Mexico commenced the *Case Concerning Avena and Other Mexican Nationals* (*Mexico v. U.S.*) (Order of March 31, 2004), *available at* http://www.icj-cij.org/ [hereinafter "*Avena*"], to seek redress for the Texas authorities' actions in Medellin's case and for various U.S. state authorities' similar failures to notify Mexican nationals about their rights in 53 other capital cases. The ICJ ruled that Texas authorities violated Article 36 in Medellin's case by not notifying him about the right to speak with a consul once they had reason to believe he was a Mexican national. In Medellin's case, as in the 50 other instances where it found Article 36 violations, the ICJ ordered U.S. courts to review his conviction to determine, without regard to procedural default doctrines, the violation's effect on the proceedings that led to his death sentence.[4] The Court of Appeals held that its prior decisions and decisions of this Court precluded it from following the ICJ's holding in *Avena*. Now, Medellin petitions this Court for certiorari to determine whether U.S. courts must follow *Avena*.

---

[1] No counsel for a party authored this brief in whole or in part. No person or entity other than *amici* or their counsel has made a monetary contribution to the preparation or submission of this brief. Counsel for Petitioner and Respondent have consented in writing to the filing of this brief *amicus curiae*.

[2] April 24, 1963, 21 U.S.T. 77 [hereinafter "Vienna Convention" or the "Convention"].

[3] April 24, 1963, 21 U.S.T. 325 [hereinafter "Optional Protocol"].

Amici nations have an immediate interest in Medellin's petition. Each *amicus* has adopted the Convention and each has a vital interest in seeing that U.S. law-enforcement authorities comply with the Convention and furnish a legal remedy for treaty violations. *Amici* have thousands of their nationals present in the United States and must ensure that those nationals receive the consular protection and support envisaged by Article 36. *Amici*, through their consuls in the United States, rely on the notice provisions in Article 36 to ensure that *amici* can provide speedy and effective assistance when federal, state, or local authorities detain one of their nationals. Without notice under Article 36, detained nationals often lose the benefit of consular assistance in criminal proceedings.

When U.S. authorities violate the Convention, *amici* have a further interest in seeing that U.S. courts apply a remedy that restores the benefits of Article 36, because consular intervention can affect the outcome of criminal proceedings. Consuls have an obligation to assist and ensure fair treatment of their nationals who become entangled in another state's criminal-justice system. In death-penalty cases, consuls can assist in obtaining mitigating evidence from the home country; the accused might otherwise lack access to such evidence. Several *amici* have nationals on death row in the United States.[5] Because of the death penalty's severity, these *amici* have a particular interest in ensuring that nationals on death row receive redress for any prejudicial effect that a treaty violation had on their defense.

More generally, *amici* nations have an interest in reciprocal compliance with international obligations. This includes abiding by the ICJ's judgments if a country has agreed by treaty to do so. In this case, the United States signed the Optional Protocol, which requires compliance with the ICJ's judgment in *Avena*. The ICJ can function effectively as a forum for peacefully resolving disputes only if *all nations* abide by its judgments in cases where they have a treaty-based obligation to comply. The reciprocity principle applies equally to the consular system codified in the Vienna Convention. In the long term, countries will not provide foreign nationals with consular notice under the Convention if the same protection is not accorded to their own citizens abroad.

INTRODUCTION AND SUMMARY OF ARGUMENT

In the past, the United States has formally protested detention of its nationals without consular notice, even when the detention lasted for only 32 hours.[6] Then as now, the United States recognized that a consul may provide critical assistance to nationals detained in another country's criminal-justice system. Vienna Convention Article 36 makes that assistance possible by requiring that local authorities notify the detained person of the right to speak with a consul. Such notice can affect the outcome of criminal proceedings. Consular assistance may take many forms, including helping to select counsel, urging prosecuting authorities to seek a reduced penalty, collecting evidence (including substantial mitigating evidence) from the home country, and monitoring proceedings.

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[4] In *Avena*, the Mexican government sought relief for 54 nationals convicted in capital cases. The ICJ held that authorities in the United States violated Article 36 in 51 of those cases. *Avena*, ¶¶ 106(1)-(2); 153(4).

[5] The Death Penalty Information Center lists on its website each country that has a national on a U.S. death row and the total number of nationals on death row for each of those countries. Death Penalty Information Center, *Foreign Nationals and the Death Penalty in the United States* (last modified July 15, 2004), *at* http://www.deathpenaltyinfo.org/.

[6] *See* LUKE T. LEE, CONSULAR LAW AND PRACTICE 145-49 (2d ed. 1991) [hereinafter "CONSULAR LAW"].

This Court should grant Medellin's Petition and order review of his case for several reasons. First, the pattern of treaty violations by local authorities in the United States, which deprives foreign defendants of consular assistance, establishes a dangerous precedent, because Article 36's vitality worldwide depends on reciprocity. If jurisdictions in the United States continue to deny detained foreign nationals notice under Article 36, and if U.S. courts fail to provide a remedy for that denial, other nations may follow suit. As the United States Department of State has recognized in its guidelines to local authorities, vigorous domestic adherence to Article 36 helps guarantee that U.S. nationals will receive the same treatment abroad. The United States insists on consular notice for its citizens when authorities in other countries detain them, and it has protested denial of, or minor delays in, consular access or notice.

Second, the ICJ's *Avena* judgment now requires U.S. courts to consider the effect of the treaty violation—denying the consular notification the United States insists upon for its own citizens—in Medellin's case. The proceedings that resulted in the *Avena* judgment took place under the Optional Protocol, which selects the ICJ as the compulsory forum for resolving disputes between states that have adopted the Protocol, as both the United States and Mexico have. The Protocol's plain language requires adherence to the ICJ's judgment.

Third, the United States should adhere to the ICJ judgment for another reason: the United States uses the ICJ to air

international grievances. The United States has commenced ten cases before the ICJ.[7] Most significantly, after the takeover of its Tehran embassy in 1979, the United States commenced the first action ever to invoke the ICJ's compulsory jurisdiction under the Optional Protocol. In that case, the United States obtained a favorable judgment ordering Iranian compliance with the Vienna Convention. *United States Diplomatic and Consular Staff in Tehran* (*U.S. v. Iran*) (May 24), 1980 I.C.J. 3, ¶ 95 (emphasis added) [hereinafter "*Diplomatic and Consular Staff*"]. When Iran failed to comply with the judgment, the United States condemned Iran's "contempt" of the ICJ.[8] Adherence to the rule of law requires U.S. compliance with the Vienna Convention and *Avena*.

ARGUMENT

I. THE VIENNA CONVENTION AFFORDS VITAL PROTECTION TO INDIVIDUALS, INCLUDING U.S. CITIZENS, WHO TRAVEL OR RESIDE OUTSIDE THEIR HOME COUNTRY.

Although consular relations have existed since ancient times, the Vienna Convention provided the first multilateral codification of a consular system. Member states established the Convention to "contribute to the development of friendly relations among nations, irrespective of their differing constitutional and social systems." Vienna Convention, Preamble. The United States Senate unanimously ratified the Vienna Convention and the Optional Protocol on October 22, 1969. 115 Cong. Rec. S30, 953, S30, 997 (daily ed. Oct. 22, 1969). The hearings on ratifying the Convention record the Senate's understanding that the Convention would preempt any conflicting state or federal laws. *See* William J. Aceves,

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[7] *See* http://www.icj-cij.org/icjwww/idecisions.htm.

[8] *Muskie Issues a Plea on Hostages*, THE NEW YORK TIMES, Aug. 30, 1980, at A3.

The Vienna Convention On Consular Relations: A Study Of Rights, Wrongs, And Remedies, 31 VAND. J. TRANSNAT'L L. 257, 267-68 (1998). J. Edward Lyerly, the Deputy Legal Advisor for the Nixon Administration, testified before the Foreign Relations Committee that "'to the extent that there are conflicts in Federal legislation or state laws[,] the Vienna Convention, after ratification, would govern. . . .'" *Id.* at 268.

A. The Convention, including Article 36, codifies the consular system on which member nations rely to ensure their citizens' fair treatment when abroad.

The ICJ described consular relations' importance in its interim order in the Iran hostage-taking case:

> [T]he unimpeded conduct of consular relations, which have also been established between peoples since ancient times, is no less important in the context of present-day international law, in promoting the development of friendly relations among nations, and *ensuring the protection and assistance for aliens resident in the territories of other states.*

Diplomatic and Consular Staff, ¶ 40 (emphasis added). Article 5(e) of the Convention lists numerous consular functions and includes within that list the functions most pertinent to this case: "helping and assisting nationals, both individuals and bodies corporate, of the sending state."

To that end, the Convention recognizes the importance of consular communication in situations where authorities in one member country detain a national of another member country. In that event, Article 36(1) requires the detaining authorities to take each of the following steps: (1) permit communication between a consul and a detained national; (2) notify a detained person "without delay" of his or her right to speak with a consul; and (3) upon request, notify the consul of the national's detention. The State Department has recognized

on multiple occasions that notification serves an "essential" function in protecting nationals who travel to foreign countries. 7 FOREIGN AFFAIRS MANUAL § 411 (1984).[9]

> [O]ne of the basic functions of a consular officer is to provide a "cultural bridge" between the host community and the officer's own compatriots traveling or residing abroad. No one needs a cultural bridge more than the individual U.S. citizen who has been arrested in a foreign country or imprisoned in a foreign jail.

Id., § 401; *see* 7 FOREIGN AFFAIRS MANUAL § 410 (2004).[10] Article 36 exists to ensure that consular officials will have a real, not merely hypothetical, opportunity to act as a "cultural bridge" for their nationals. Detained individuals unschooled in foreign affairs matters often would not know to request communication with their consul. The Convention thus obligates states to notify persons of that right.

B. With proper notice, a consul can provide a detained national a wide array of assistance that can affect—and actually has affected—the outcome of criminal proceedings.

"Detained foreign nationals are inevitably distressed by the prospect of securing and preserving their rights in a legal system with whose institutions and rules they are not familiar." CONSULAR LAW at 145 (quoting U.S. DEP'T. OF STATE, TELEGRAM 40298 TO EMBASSY DAMASCUS, Feb. 21, 1975). "To minimize the disadvantages experienced by accused foreigners, international law guarantees the right of consular access." S. A. Shank & J. Quigley, *Foreigners on Texas's Death Row and the Right of Access to Consul*, 26 ST. MARY'S L.J. 719, 721 (1995). The Foreign Affairs Manual—

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[9] *Available at* http://web.archive.org/web/20040301104701/foia.state.gov/REGS/fams.asp? level=2&id=8&fam=0.

[10] *Available at* http://foia.state.gov/REGS/fams.asp?level=2&id=8&fam=0.

the State Department's own instructions to United States consular officers—recognizes the consul's role in helping a detainee understand the unfamiliar criminal-justice system that he or she must navigate. 7 FOREIGN AFFAIRS MANUAL §§ 400-426.2-1 (2004).

Consular assistance in navigating a foreign judicial system may take many forms. First, consular officials can help the detained national in selecting counsel, and in some cases, may even recruit pro bono counsel. The United States, Mexico, and the United Kingdom have specific guidelines for their consuls to assist nationals in obtaining counsel. CONSULAR LAW, at 125, 127 & 166. These published instructions typify the practices followed by many nations. In one case, Mexican consular officials in Houston helped secure *pro bono* representation after trial from the firm Vinson & Elkins for Ricardo Aldape, a Mexican national sentenced to death in Texas. The firm's efforts exposed intimidation and manipulation of witnesses "calculated to obtain a conviction" despite "the lack of evidence pointing to [Aldape's]" guilt. *Note: Reciprocity Unmasked: The Role of the Mexican Government in Defense of Its Foreign Nationals in United States Death Penalty Cases*, 20 ARIZ. J. INT'L & COMP. LAW 359, 372 (2003) (quoting *Guerra v. Collins*, 916 F. Supp. 2d 620, 637-38 (S.D. Tex. 1995)) [hereinafter "*Reciprocity Unmasked*"]. Aldape prevailed in habeas corpus proceedings, and prosecutors decided not to try him again, so he was released and returned to Mexico. "[T]he attorney that handled the case noted that 'without the Mexican consul's involvement, I have no doubt that [Aldape] would never have been released.'" *Id.* at 373-74. The Mexican government also participated extensively in the case of Osbaldo Torres, one of the individuals covered by the *Avena* judgment. As discussed in Medellin's Petition, the Oklahoma Court of Criminal Appeals stayed Torres's execution and remanded the case for an evidentiary hearing to determine the Article 36 violation's effect in that case. Medellin Petition, at 25-26, 142A-163A. The Mexican government took many actions to assist Torres: Mexico's ambassador to the United States spoke at Torres's clemency hearing, Mexico filed an *amicus* brief in the Oklahoma Court of Criminal Appeals, and Mexican President Vicente Fox personally urged Oklahoma Governor Brad Henry to delay the execution.[11] Governor Henry ultimately commuted Torres's sentence to life in prison.[12]

Second, prior to trial, consular officials may address the prosecuting authorities regarding the case. In capital cases, this may include presenting reasons for the prosecutor not to seek the death penalty, such as mitigating evidence, criminal history (or lack thereof), and the accused's personal circumstances. Missing the chance to present this evidence, which may be located in the home country and thus inaccessible to domestic counsel, significantly increases the foreign national's chance of a death sentence because prosecutors more often than not will decide against seeking the death penalty when faced with substantial mitigating evidence. Shank & Quigley, at 740; *see also McKleskey v. Kemp*, 481 U.S. 279, 307 n.28 (1987) ("[T]he strength of the available evidence . . . may influence a prosecutor's decision to offer a plea bargain or go to trial.").

Third, the consul may help collect evidence for use at trial and, in death-penalty cases, during the penalty phase. Because mitigating evidence may exist in the national's home country rather than in the place of the trial, consuls can provide invaluable assistance in collecting that evidence. *See*

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[11] Associated Press, *Death Penalty Opponents Urge Clemency for Torres*, May 12, 2004, *available at* http://ocadp.org/news/2004/torres/opponents_urge.html.

[12] Mexican Secreteriat of Foreign Relations, Press Release No. 106, *Osvaldo Torres' Execution in Oklahoma is Suspended*, *available at* http://www.sre.gob.mx/eua/English/Press/Release/2004/May/SRETorresCourt.pdf.

Reciprocity Unmasked, at 368 (describing how Mexican officials collected evidence of a defendant's diminished mental capacity from his home town and with that evidence, helped reduce his sentence from death to life in prison); *Note: Strangers in a Strange Land: Assessing the Fate of Foreign Nationals Arrested in the United States by State and Local Authorities*, 78 MINN. L. REV. 771, 772-73 n.6 (1994) (referring to guidelines requiring a Canadian consul "to obtain case related information" on behalf of charged nationals).

Fourth, consuls monitor proceedings involving their nationals as a matter of course to ensure fairness and compliance with international standards. Several countries publish specific guidelines for this monitoring. The State Department's guidelines require its consuls to attend any U.S. national's trial, protest any discrimination, and monitor the well-being of incarcerated citizens. CONSULAR LAW, at 169-71 The United Kingdom requires its consuls "to intervene in judicial proceedings" in the event of a "prime-facie miscarriage or denial of justice" or "when appeal to a higher authority would obviously be futile." *Id.* at 125. The potential for discrimination against a foreign national makes consular monitoring particularly important in capital cases. Shank & Quigley, at 741.

Furthermore, consuls can provide assistance beyond the four major categories listed here. For instance, Mexico historically has actively assisted its nationals in U.S. criminal proceedings and in 2000 formed the Mexican Capital Legal Assistance Program. *See Reciprocity Unmasked*, at 393-94. As described above, Mexico's intervention resulted in the outright release of Ricardo Aldape and averted death sentences in three other Mexican nationals' cases. *Id.* at 368-74. None of this vital assistance can occur absent compliance with Article 36 of the Vienna Convention.

II. THE CONTINUED VIABILITY OF ARTICLE 36 DEPENDS ON RECIPROCITY AMONG NATIONS.

This Court long ago recognized that "international law obligations are of necessity reciprocal in nature" and that "what is law for one is, under the same circumstances, law for the other." *United States v. Arjona*, 120 U.S. 479, 487 (1887). International law and United States' foreign-relations law follow the cardinal rule that treaties must be observed (*pacta sunt servanda*). RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §321 cmt. a. "[T]he doctrine of *pacta sunt servanda* . . . lies at the core of the law of international agreements and is perhaps the most important principle of international law." *Id.* "It includes the implication that international obligations survive restrictions imposed by domestic law." *Id.*; U.S. CONST. art. VI, cl. 2 (international treaties preempt conflicting state law under the Supremacy Clause). When one state fails to comply with its treaty obligation, it influences others to do the same. As Justice Brandeis observed, "Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example." *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

A. The United States insists on Article 36's protections for its nationals abroad.

Beginning with the Vienna Convention itself, the United States historically has recognized the importance of Article 36, a position that makes the United States' reciprocal compliance with Article 36 particularly critical. At the Vienna Convention, the U.S. delegation stated that "no country could disregard its obligation in certain circumstances to inform consuls of the sending state of the arrest of its nationals." LUKE T. LEE, VIENNA CONVENTION ON CONSULAR RELATIONS 111 (1966). Indeed, it was the United States, along with several other countries, that sponsored the amendment that ultimately became Article 36. *Id.* at 113. The Unites States has taken the position that Article 36 created "'[o]bligations of the highest order'" that require notification "as quickly as possible and, in any event, no later than the passage of *a few days.*" ARTHUR W. ROVINE, DEP'T. OF STATE, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 161 (1973) (emphasis added).

The United States' insistence on consular notice has extended to specific cases involving its nationals in other countries. When the Syrian government detained two American citizens, the State Department chastised it for failing to provide consular notice in accordance with bilateral treaties and customary international law:

> The right of governments, through their consular officials, to be informed promptly of the detention of their nationals in foreign states, and to be allowed prompt access to those nationals, is well established in the practice of civilized nations . . . .

CONSULAR LAW, at 145 (quoting TELEGRAM 40298). The same document emphasized the importance of reciprocity: "The recognition of these rights is prompted in part by considerations of reciprocity. . . . The Government of the Syrian Arab Republic can be confident that if its nationals were detained in the United States the appropriate Syrian officials would be promptly notified and allowed prompt access to these nationals." *Id.*

The State Department also protested the alleged violation of Article 36 by foreign authorities who detained two Americans, even though the authorities released the Americans after 32 hours. The United States considered the principle of complying with Article 36 so important that it actually lodged the protest *after* release, asking a senior minister of the detaining country to "elaborate expeditiously" as to "[w]hy the . . . two United States citizens were not

informed of their right to contact the Consulate as provided under [A]rticle 36 of the Vienna Convention on Consular Relations of 1963; and why the Consulate was not officially informed of the detention of two United States Citizens until approximately 28 hours afterward." CONSULAR LAW, at 149. In that instance, the detaining authorities released the individuals in less than two days and gave notice to the U.S. consulate. In contrast to that relatively rapid action, Texas arrested, tried, convicted, and sentenced 18-year-old Medellin to death, and then allowed him to remain on death row during appellate proceedings, without ever notifying the Mexican consulate or telling Medellin that he had the right to contact the consulate. Medellin learned about his right to contact the consulate four years after his arrest, when he was already on death row.

The State Department's actions and statements leave no doubt about the importance that the United States places on rapid consular notification when foreign authorities detain Americans. In fact, the State Department *requires* consular officials to lodge a protest if detaining authorities do not notify the consul within 72 hours. 7 FOREIGN AFFAIRS MANUAL § 426.2-1 (2004). But, as the State Department has also recognized, the United States can expect swift notification only in an environment of reciprocity.

B. Texas's treaty violation has international repercussions.

Texas's treaty violation in Medellin's case and the courts' failure to provide a remedy for that violation create a dangerous legal precedent, particularly because those failures fit an ongoing pattern of violations by Texas and other states.[13] Other nations may follow the United States' practice by disregarding Article 36's notice requirement and by failing to offer any remedy for its violation. The State Department's own instructions to U.S. law-enforcement authorities regarding consular notification recognize this danger:

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[13] *See Avena*, ¶ 106 (listing 51 cases in which various U.S. jurisdictions violated Article 36).

> The Department of State appreciates the continued cooperation of federal, state, and local law enforcement agencies in helping to ensure that foreign nationals in the United States are treated in accordance with these instructions. *Such treatment will permit the United States to comply with its consular legal obligations domestically and to continue to expect rigorous compliance by foreign governments with respect to United States citizens abroad.*

U.S. DEP'T. OF STATE, CONSULAR NOTIFICATION AND ACCESS 13 (2003) (emphasis added).[14] Reciprocity provides the underpinning for Article 36 and international law generally. To benefit from Article 36 when its citizens travel abroad, the United States must adhere to it domestically.

III. THE UNITED STATES MUST FOLLOW THE ICJ'S *AVENA* JUDGMENT, WHICH SPECIFICALLY ADDRESSES THE MEDELLIN CASE.

The United States has adopted the Optional Protocol, which makes the ICJ the authoritative interpreter of the Vienna Convention and gives the ICJ compulsory jurisdiction over any disputes involving the Convention. Optional Protocol, Art. 1. Mexico invoked that jurisdiction in the *Avena* case to resolve its claims against the United States for violating Article 36 in 54 specific instances, including Medellin's case. The ICJ issued a judgment that requires judicial review of Medellin's case to determine whether Texas's treaty violation prejudiced Medellin's defense. *Avena*, ¶¶ 121, 139. Under the Optional Protocol, the ICJ's decision binds U.S. courts, which must conduct the review ordered in *Avena*.

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[14] *Available at* http://travel.state.gov/law/CNA_book.pdf.

A. The United States proposed, advocated for, and joined the Optional Protocol, which establishes the ICJ as authoritative interpreter of the Convention.

The Optional Protocol provides that "[d]isputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol." Optional Protocol, Art. 1. International law and United States foreign-relations law require domestic courts to follow the Optional Protocol's plain text and to accept the ICJ's interpretations as binding. RESTATEMENT, § 321 cmt. a. These obligations bind not only the national government, but also any political subdivisions, including the states. *See* Aceves, at 267-68. The U.S. Constitution's Supremacy Clause codifies this principle into domestic law by giving preemptive force to ratified treaties. U.S. CONST., art. VI, cl. 2; *Wildenhus's Case*, 120 U.S. 1, 17 (1887).

The United States understood the Optional Protocol's unambiguous terms when it adopted the Protocol. The United States proposed the original text that, in modified form, became Article 1 of the Optional Protocol. *See* Report of the United States Delegation to the Vienna Conference on Consular Relations, *reprinted in* Sen. Exec. Doc. E, 91st Cong., 1st Sess., May 8, 1969, at pp. 72-73. And the United States acted as one of the Optional Protocol's strongest advocates at the Vienna Convention, successfully defeating any efforts to diminish the compulsory jurisdiction that the Protocol conferred on the ICJ. *Id.* By adopting the Optional Protocol, the federal government made it "part of the Supreme law of the United States," and Texas must therefore give the Protocol "force and effect." *Wildenhus's Case*, 120 U.S. at 17. As Oklahoma Court of Criminal Appeals Justice

Charles Chapel noted in his *Torres* concurrence: "The United States is bound by the terms of the treaty and the State of Oklahoma is obligated by virtue of the Supremacy Clause to give effect to the treaty." Medellin Petition, at 150A.

B. *Avena* requires U.S. courts to review—without resorting to procedural default doctrines—the effect that Texas's treaty violation had on Medellin's defense.

Mexico's application instituted ICJ proceedings against the United States under the Optional Protocol for "violations of the Vienna Convention on Consular Relations," in connection with the cases of 54 Mexican nationals, including Medellin. *Avena*, ¶ 1. In addition to seeking declarations that denying consular notice under Article 36 violated international law, Mexico asked the ICJ for relief that would "restore the *status quo ante*, that is, re-establish the situation that existed before the detention of, proceedings against, and convictions and sentences of, Mexico's nationals in violation of the United States' international legal obligations." *Id.*, ¶ 14(5). The United States participated fully in the *Avena* proceedings.

When it reached the merits, the ICJ determined that local authorities in the United States had violated Article 36 in 51 cases, including Medellin's case. *Id.*, ¶¶ 106, 114. But the ICJ did not order the *status quo* restoration sought by Mexico. Rather, the ICJ ordered a more limited remedy, requiring judicial review and reconsideration of the Mexican nationals' sentences by "tak[ing] account of the violation of the rights set forth in the Convention and guarantee[ing] that the violation and the possible prejudice caused by that violation will be fully examined." *Id.*, ¶ 138 (citations omitted). The ICJ judgment precludes application of "procedural default" as a bar to substantive review and requires "review and reconsideration . . . both of the sentence and of the conviction." *Id.*, ¶¶ 131-39. "[W]hat is crucial in the review and reconsideration process is the existence of a procedure which guarantees that full weight is given to violation of the rights set forth in the Vienna Convention . . . ." *Id.*, ¶ 139. Because the *Avena* judgment directly addresses Medellin's case, the Optional Protocol binds U.S. courts to follow that judgment.

The full consideration and U.S. participation that preceded the ICJ's issuing its *Avena* decision distinguishes this case's circumstances from this Court's earlier decisions in *Federal Republic of Germany v. United States*, 526 U.S. 111 (1999) (*per curiam*) and *Breard v. Greene*, 523 U.S. 371 (1998) (*per curiam*). In those instances, Germany and Paraguay had filed ICJ actions just days or hours before scheduled executions and then asked this Court to stop those executions based on provisional stay orders that the ICJ issued immediately after the cases were filed. *Federal Republic of Germany*, 526 U.S. at 111-12; *Breard*, 523 U.S. at 374. In both instances, this Court made particular note of the tardiness in seeking relief, and the United States contended that the ICJ's provisional orders were not binding. *See* William J. Aceves, *International Decision: Case Concerning the Vienna Convention on Consular Relations (Federal Republic of Germany v. United States)*, 93 AM. J. INT'L L. 924, 926 n.16 (1999). In Medellin's case, the plea is not tardy, because the ICJ decided *Avena* long before his scheduled execution and he raised *Avena* as grounds for relief in the Court of Appeals. *Medellin v. Dretke*, 371 F.3d 270, 280 (5th Cir. 2004).[15] Unlike the ICJ orders at issue in *Federal Republic of Germany* and *Breard*, the United States has never argued that the ICJ's final judgment in *Avena* is not binding. Denying Medellin the remedy ordered in *Avena*—substantive review of the effect that Texas's treaty violation had upon his defense—would amount to contumacy of a fully considered ICJ judgment and would compound the original international-law violation that occurred when Texas authorities violated Article 36. *See* Frederic L. Kirgis, *Restitution as a Remedy in U.S. Courts for Violations of International Law*, 95 AM. J. INT'L L. 341, 343 (2001) ("International law includes not only norms regarding substantive conduct, but also binding remedial norms. The remedial norms are important.").

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[15] Although the ICJ had not yet issued its *Avena* decision at the time, Medellin raised the Texas authorities' Vienna Convention violation as a ground for relief in the district court, citing the ICJ's final decision in the case that was the basis for this Court's decision in *Federal Republic of Germany*. *Id.*

C. The United Nations Charter requires the United States to comply with ICJ judgments.

The United States Senate has ratified the United Nations charter, a multilateral treaty. Charter of the United Nations, June 26, 1945, 59 Stat. 1031 [hereinafter "U.N. Charter"]. The U.N. Charter establishes the ICJ as the United Nations' "principal judicial organ," and "each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party." U.N. Charter, Art. 92, 94. By adopting Article 94 of the U.N. Charter, the United States has "transferr[ed] adjudicatory authority to the U.N. and its organs," and attributes "binding legal force to their decisions." Sanja Djajic, *The Effect of International Court of Justice Decisions on Municipal Courts in the United States: Breard v. Greene*, 23 HASTINGS INT'L & COMP. L. REV. 27, 50 (1999). Like the Optional Protocol, the U.N. Charter requires the United States to comply with *Avena*.

CONCLUSION

Medellin's petition for certiorari presents questions of urgent national and international importance. The United States relies on Vienna Convention Article 36 to protect its nationals in foreign countries, but the continued viability of Article 36 depends on reciprocal adherence to its mandates. A pattern of denying consular notification has emerged in local U.S. jurisdictions, and only a judicial remedy for those

violations can ensure continuing compliance with Article 36 around the world. Moreover, the ICJ, which had compulsory jurisdiction over Mexico's claim against the United States for violating Article 36, issued an order requiring U.S. courts to review the violation in Medellin's case to determine the effect it had on his defense. Compliance with the ICJ's judgment will reinforce the rule of law, which the United States so forcefully advocates around the world.

For all the reasons stated in the Brief, this Court should grant Medellin's Petition.

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No. 04-5928

IN THE
Supreme Court of the United States

JOSE ERNESTO MEDELLIN,

Petitioner,

v.

DOUG DRETKE, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF *AMICUS CURIAE* OF THE GOVERNMENT OF THE UNITED MEXICAN STATES IN SUPPORT OF PETITIONER JOSE ERNESTO MEDELLIN

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INTEREST OF AMICUS CURIAE[1]

By signing and ratifying the Vienna Convention on Consular Relations, *opened for signature* Apr. 24, 1963, 21 U.S.T. 77, the Government of Mexico and the Government of the United States made commitments to each other, to their other treaty partners, and to the rule of law. Specifically, the United States committed that detained Mexican nationals would be promptly notified of their right to seek consular assistance, and that Mexico would be permitted to provide consular protection to those nationals. And by signing and ratifying the Optional Protocol to the Vienna Convention, the Government of Mexico and the Government of the United States committed to a dispute resolution mechanism that conferred jurisdiction on the International Court of Justice to resolve conflicts over the interpretation and application of the treaty's provisions. Optional Protocol Concerning the Compulsory Settlement of Disputes, art. 1, *opened for signature* Apr. 24, 1963, 21 U.S.T. 325. These commitments have now been called into question by the actions of the United States Court of Appeals for the Fifth Circuit.

On March 31, 2004, the International Court of Justice ("ICJ") rendered its judgment in *Avena and Other Mexican Nationals*. The ICJ held that the United States had violated the rights of Mexico and of Mr. Medellín under Article 36 of the Vienna Convention. As a remedy for those violations, the ICJ held that the United States must provide Mr. Medellín with review and reconsideration of his conviction and sentence that gives full effect to the purposes of Article 36. Nevertheless, on May 20, 2004, the Court of Appeals refused even to grant a certificate of appealability to review Mr. Medellín's Vienna Convention claim, violating the international legal obligation of the United States to abide by the ICJ's judgment.

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[1] Petitioner's Counsel of Record and Mexico's Counsel of Record served as co-counsel to Mexico as *amicus curiae* in *Torres v. State*, No. PCD-04-442 (Okla. Crim. App. May 13, 2004), and this brief is based in part on a brief prepared in that case. No person or entity other than the Government of Mexico made a monetary contribution to the preparation or submission of this brief. Petitioner and Respondent have given blanket consent to the filing of amicus briefs by letters of consent on record with the Clerk.

Mexico has a direct interest in compliance by the United States with *Avena*. The very purpose of Article 36 of the Vienna Convention is to permit the nations that signed that Convention – including Mexico, the United States, and 164 other countries – to protect the interests of their citizens when they are arrested or otherwise detained while living, working, or traveling abroad. That interest cannot be more acute than when a citizen is tried in another country for a crime that may lead to his execution.

Further, Mexico brought the *Avena* case to establish the scope of the Vienna Convention violations *in Mr. Medellín's case*, among others, and to resolve an ongoing dispute with the United States over the remedy to which he is entitled. The International Court of Justice reviewed the facts of Mr. Medellín's case, determined that the United States had violated his individual right to seek consular assistance, and crafted a specific remedy to be provided by the United States judiciary. Under both international and United States law, *Avena* constitutes a binding adjudication of Mr. Medellín's rights that the United States must fully implement. The Court of Appeals has violated its own obligation to do so.

For that reason, this case raises issues that are fundamentally different than those this Court has considered in every previous petition for writ of certiorari raising a Vienna Convention violation. *None* of the previous cases reviewed by this Court have asked the Court to apply a final judgment of the International Court of Justice, a tribunal whose judgments the United States is bound to uphold, adjudicating the petitioner's *own* rights, after proceedings in which the United States fully participated.

In compliance with the treaty obligations of the United States, Mexico respectfully requests that this Court grant certiorari, and allow for the review and reconsideration mandated by the ICJ in *Avena*.

REASONS FOR GRANTING THE PETITION

I. Mexico and the United States Agreed by Treaty to Submit Disputes About the Vienna Convention to the International Court of Justice for Binding Resolution.

When the United States and Mexico ratified the Vienna Convention on Consular Relations and its Optional Protocol, they exchanged solemn promises to abide by the terms of those instruments. Article 1 of the Optional Protocol provides:

> Disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an

> application made by any party to the dispute being a Party to the present Protocol.

Optional Protocol, art. 1.

On January 9, 2003, after determining that the United States had violated the Vienna Convention in virtually every case in which a Mexican national was facing the death penalty, and after unsuccessfully seeking remedies for those nationals through legal and diplomatic channels, Mexico invoked the Optional Protocol and brought suit in the International Court of Justice. *See* Mexico's Application Instituting Proceedings, (Mex. v. U.S.), No. 128 (Avena and Other Mexican Nationals) (I.C.J. Jan. 9, 2003), *available at* http://www.icj-cij.org. The United States fully participated in those proceedings, at the conclusion of which the ICJ found that the United States had violated the Article 36 rights of 51 Mexican nationals, including Mr. Medellín. Avena and other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 128 (Mar. 31)[hereinafter "*Avena* Judgment"].

The binding character of the commitment the United States made in the Optional Protocol is reinforced by the United Nations Charter, also ratified by both the United States and Mexico. By Article 94(1) of the Charter, the United States expressly agreed to "comply with the decision of the International Court of Justice in any case to which it is a party." U.N. CHARTER, art. 94, para. 1. By Article 59 of the Statute of the International Court of Justice, which forms part of the Charter, the United States expressly agreed that judgments of the Court have "binding force" upon it in cases to which it is a party. Statute of the International Court of Justice, art. 59, June 26, 1945, 59 Stat. 1055, T.S. 993.

Without the United States's express consent, the International Court of Justice could not have heard the *Avena* case or rendered the *Avena* Judgment. Having given its consent, and having fully participated in the proceedings, the United States must now abide by the result.

II. The United States Must Provide Review and Reconsideration of Mr. Medellín's Conviction and Sentence as Required by *Avena*.

In *Avena*, the International Court of Justice held (by fourteen votes to one, the majority including Judges from both the United States and Mexico) that the United States had violated its obligation under Article 36(1) to inform Mr. Medellín of his right to consular notification and assistance, as well as the rights of Mexico to communicate with him, render consular assistance, and arrange for his legal representation. *Avena* Judgment, para. 153(4)-(7). To remedy these violations, the ICJ held that the United States had to provide "review and reconsideration" of Mr. Medellín's conviction and sentence by fully assessing the prejudice caused by the Vienna Convention violations. *Id.* at para. 153(9). The ICJ rejected the United States's argument that review and reconsideration could be achieved through the clemency process, holding instead that the review must occur "within the overall judicial proceedings relating to the individual defendant concerned." *Id.* at 141; *see also id.* at 140.

The International Court of Justice made clear that the judicial "review and reconsideration" contemplated by its decision had not yet taken place in Mr. Medellín's case. Mexico supplied the International Court of Justice with the Texas trial court's findings of fact and conclusions of law from state post-conviction proceedings,[2] and provided a separate summary of the Texas court's reasons for rejecting Mr. Medellín's Vienna Convention claim. Memorial of Mexico at A-103, Annex 7, para. 238. The United States submitted its own account of state and federal post-conviction proceedings, including a description of how each court had resolved Mr. Medellín's Vienna Convention claim. Counter Memorial of the United States of America at A-223, App. 38, para. 7, (Mex. v. U.S.), No. 128 (Avena and other Mexican Nationals) (I.C.J. Nov. 3, 2003). After reviewing these facts, the court determined that Mr. Medellín was entitled to *de novo* review and reconsideration in accordance with the guidelines set forth in its opinion. *Avena* Judgment, para. 153(9).

A. The Lower Courts' Summary Resolution of Mr. Medellín's Article 36 Claim Was Clearly Deficient Under *Avena.*

The *Avena* Court set forth specific requirements for effective review and reconsideration – none of which have been met by the courts that have summarily disposed of Mr. Medellín's Article 36 claim.

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[2] *See* Respondent's Proposed Findings of Fact, Conclusions of Law, and Order, No. 675430-A, (339th Dist. Ct., Tex. Jan. 22, 2001) (Petition for Writ of Certiorari, App. 34A) [hereinafter "Respondent's Proposed Findings"]; Memorial of Mexico, Annex 55, (Mex. v. U.S.), No. 128 (Avena and other Mexican Nationals) (I.C.J. June 20, 2003).

First, the *Avena* Court reiterated its holding in *LaGrand* that procedural default doctrines may not be invoked where it was "the failure of the United States itself to inform" the national of his Article 36 rights that impeded his ability to raise the violation at trial. *Id.* at paras. 112-13; LaGrand (F.R.G. v. U.S.), paras. 90-91, 2001 I.C.J. 104 (June 27)[hereinafter "*LaGrand* Judgment"]. Yet contrary to the International Court's holdings in *LaGrand* and *Avena,* every court has found Mr. Medellín's Article 36 claim to be procedurally barred, even though Mr. Medellín was never notified of his Article 36 rights, and did not learn of his right to seek consular assistance until after his direct appeal had already been denied. Respondent's Proposed Findings at 19; *Medellín v. Cockrell,* No. H-01-4078, Order at 18-20 (S.D. Tex. Jun. 26, 2003).

Second, the International Court stressed that the review and reconsideration had to be "effective" and "guarantee that the violation and the possible prejudice caused by that violation . . . be fully examined and taken into account." *Avena* Judgment at para. 138; *see also id.* at para. 131. Yet the lower courts' resolution of the claim was neither "effective" nor thorough,[3] and failed to apply the proper harm analysis. Both the Texas trial court and the federal district court determined that since Mr. Medellín had received the protections to which he was entitled under the United States Constitution, he had failed to show harm. Respondent's Proposed Findings at 20; *Medellín v. Cockrell*, No. H-01-4078, Order at 23. Indeed, this was precisely the argument advanced by the United States in the *Avena* proceedings,[4] and it was soundly rejected by the International Court of Justice:

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[3] The trial court adopted verbatim the state's proposed findings of fact and conclusions of law, without bothering even to change the title of the document. The state court's failure to engage in an independent analysis of the claim is apparent from even a superficial review of the record. For example, the court signed off on the state's proposed finding that Mr. Medellín "fail[ed] to show foreign nationality." Respondent's Proposed Findings at 19. Yet the trial transcript and one of the state's own exhibits provided conclusive proof to the contrary. Mr. Medellín's father testified at the penalty phase that his son was born in Mexico, and had not become a permanent resident. S.F. vol. 35 at 282. Mr. Medellín himself told the police during his interrogation that he was born in Mexico, State's Ex. 113 at

> [I]n a situation of the violation of rights under Article 36, paragraph 1, of the Vienna Convention, the defendant raises his claim in this respect not as a case of "harm to a particular right essential to a fair trial" – a concept relevant to the enjoyment of due process rights under the United States Constitution – but as a case involving the infringement of his rights under Article 36, paragraph 1. The rights guaranteed under the Vienna Convention are treaty rights which the United States has undertaken to comply with in relation to the individual concerned, irrespective of the due process rights under United States constitutional law. In this regard, the Court would point out that what is crucial in the review and reconsideration process is the existence of a procedure which guarantees that *full weight* is given to the violation of the rights set forth in the Vienna Convention, whatever may be the actual outcome of such review and reconsideration.

Avena Judgment, para. 139 (emphasis added).

Third, the *Avena* Court explained that review and reconsideration must be conducted by a court that is empowered "to examine the facts, and in particular the prejudice and its causes, taking account of the violation of the rights set forth in the Convention." *Id.* at para. 122. In the United States, facts are examined in an adversary proceeding during which a party has a full opportunity to conduct discovery, present witnesses and other evidence. *See* Rule 8 of the Rules Governing §2254 Cases in the United States District Courts; RANDY HERTZ & JAMES S. LIEBMAN, 2 FED. HABEAS CORPUS PRACTICE & PROC. § 20.1(b) (4th ed. 2001). As this Court observed in *Breard v. Greene*, "[w]ithout a hearing, [the petitioner] cannot establish how the Consul would have advised him, [or] how the advice of his attorneys differed from the advice the Consul could have provided." 523 U.S. 371, 376 (1998). Yet neither the federal district court nor the Texas trial court held an evidentiary hearing on the Article 36 claim.

The lower courts have failed in their obligation to provide effective review and reconsideration. It is now the responsibility of this Court to enforce the mandate of the International Court of Justice.

000076 (Statement of José Ernesto Medellín Rojas), and informed pre-trial services that he was not a United States citizen. Respondent's Original Answer, Exhibit C, No. 675430-A (339th Dist. Ct., Tex. Feb. 16, 2000) (Harris County Pretrial Services Agency Defendant Interview form, dated June 29, 1993).

[4] *See, e.g.*, Transcript at para. 3.22, Avena and other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 124 (Oral Pleadings, Dec. 19, 2003, 3:00 p.m.) ("It is true that a court in the United States generally will not grant relief to an individual for a claim cast merely as a claim for a breach of the Vienna Convention, as such. But. . . . that is not a bar to satisfying the requirements of *LaGrand*. . . the courts can entertain any and all claims alleging that a breach of the Convention has resulted in harm to a specified right that is essential to a fair trial.").

B. The Article 36 Violation Deprived Mexico of the Opportunity To Provide the Extraordinary Assistance that it Regularly Provides Mexican Capital Defendants.

Since well before the trial of Mr. Medellín, Mexico has provided critical resources to aid in the defense of its nationals facing the death penalty. *See, e.g.,* Memorial of Mexico at 11-38 (describing the history and nature of Mexico's consular assistance program); Michael Fleishman, Note, *Reciprocity Unmasked: The Role of the Mexican Government in Defense of Its Foreign Nationals in United States Death Penalty Cases*, 20 Ariz. J. Int'l & Comp. Law 359, 366-374 (2003) (same); *Valdez v. State*, 46 P.3d 703, 710 (Okla. Crim. App. 2001) (concluding that Mexico would have intervened in a 1989 capital murder prosecution to assist with a Mexican national's defense and to provide resources to ensure that the defendant received a fair trial and sentencing hearing); Raymond Bonner, *U.S. Bid to Execute Mexican Draws Fire,* N.Y. Times, Oct. 26, 2000, at A20 (describing consular involvement in a Florida capital prosecution, and noting Mexico's reported involvement in 261 death penalty cases since 1994); Louis Shagun & Juanita Darling, *Unexpected Friend on Death Row*, L.A. Times, January 2, 1994, at A1 (describing Mexico's intervention in capital cases in Idaho, California, Kentucky, and Texas); C. Cooper, *Foes of Death Penalty Have a Friend in Mexico,* Sacramento Bee, 26 June 1994, at A1 (noting Mexico's intervention in Kentucky and California capital cases where death penalty avoided). Indeed, Mexico can trace its involvement in criminal cases involving its nationals to the

early twentieth century. *See Torres v. State,* No. PCD-04-442 (Okla. Crim. App. May 13, 2004), Petition for Writ of Certiorari at 155A (Chapel, J., concurring) (noting that Mexico has had a tradition of active consular assistance in capital cases since the 1920s); William Aceves, *The Vienna Convention on Consular Relations: A Study of Rights, Wrongs and Remedies,* 31 Vand. J. Transnat'l L. 257, 272 n.2 (1998) (citing a 1934 case in which Mexican consular officials sought access to a national held in a California jail).

Consular officials provide funding for experts and investigators, assist in gathering documents relevant to the penalty phase defense, assist in conducting mitigation investigations, act as a liaison with Spanish-speaking family members, and most important, ensure that Mexican nationals are represented by competent and experienced defense counsel. Not surprisingly, the United States government acknowledges that the consular assistance Mexico provides its nationals in capital cases is "extraordinary." 1 Counter-Memorial at 186.

Given the extraordinary consular assistance that Mexico provides its nationals in capital cases, the import of the Vienna Convention violation in Mr. Medellín's case is clear. Further, in light of trial counsel's appalling performance, there is little doubt that the assistance available from Mexican consular officials would have had a dramatic effect on the quality of the defense – particularly at the penalty phase. Trial counsel was suspended from the practice of law for ethics violations during the investigation and prosecution of Mr. Medellín's case. Memorial of Mexico, Annex 7, App. A, para. 232. The centerpiece of counsel's two-hour penalty phase defense was a psychologist, Dr. Wendell Dickerson, who had never met Mr.

Medellín. S. F. vol. 35 at 294-348. The defense utterly failed to explore Mr. Medellín's life history in order to provide a mitigating explanation for his role in the crime—the most elemental component of effective capital case advocacy. *See Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) ("[E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background. . . may be less culpable than defendants who have no such excuse"); *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982) (citing *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976)) (noting that consideration of the offender's life history is a "'part of the process of inflicting the penalty of death'").

III. The Decision Below Rested in Part on a State Department Interpretation of the Vienna Convention That Cannot Survive *LaGrand* and *Avena.*

In *LaGrand* and *Avena*, the International Court of Justice held that detained foreign nationals have individually enforceable rights under Article 36 of the Vienna Convention. *LaGrand* Judgment, paras. 77, 89; *Avena* Judgment, paras. 40, 140. In reliance on its prior opinion in *United States v. Jimenez-Nava*, 243 F.3d 192 (5th Cir. 2001), the Court of Appeals held to the contrary. The decision in *Jimenez-Nava*, however, relied on the interpretation of the Vienna Convention provided by the State Department to the First Circuit in the pre-*LaGrand* case of *United States v. Li*, 206 F.3d 56 (1st Cir. 2000). That interpretation cannot survive *LaGrand* and *Avena*,

and the State Department has not reiterated that interpretation at any time since those judgments were issued.

In *Li*, the Court of Appeals invited the State Department to answer several questions concerning the interpretation of Article 36 of the Vienna Convention. In response, the State Department opined that the Vienna Convention did not create individual rights, and that "the right of an individual to communicate with his consular official is derivative of the sending state's right to extend consular protection to its nationals." *Id.* at 63. Further, the State Department expressed its view that "[t]he [only] remedies for failures of consular notification under the [Vienna Convention] are diplomatic, political, or exist between states under international law." *Id.* The *Li* Court relied on the State Department position in holding that Article 36 did not give rise to individual rights. *Id.* ("[i]n the State Department's view, the treaties do not create individual rights at all").

The United States took the same position before the International Court of Justice in *LaGrand*, but that Court rejected it. It held that individuals *do* have rights under the Convention, that their rights are *not* derivative of the sending state, and that a diplomatic apology was *not* a sufficient remedy for a violation of Article 36. *LaGrand* Judgment, paras. 76, 77, 89, 123, 125.

The United States did not repeat in *Avena* the arguments the ICJ had rejected in *LaGrand.* Nor has the State Department urged any court to adopt *Li*'s interpretation of Article 36 since *LaGrand* was decided. Given the undertaking the United States made in the Optional Protocol to submit disputes arising from the Convention for binding adjudication by the ICJ, it could not continue to promote its earlier, erroneous interpretation of Article 36. Nevertheless, at least three other Courts of Appeals in addition to the Fifth Circuit have relied upon the State Department's now obsolete opinion in analyzing Vienna Convention violations. *See United States v. Duarte-Acero*, 296 F.3d 1277, 1281-82 (11th Cir. 2002) (citing *Li*'s conclusions regarding the lack of individual rights); *United States v. De La Pava*, 268 F.3d 157, 164-65 n.6 (2d Cir. 2001) (referring to the State Department's representations in *United States v. Li*); *United States v. Page*, 232 F.3d 536, 541 (6th Cir. 2000) (citing to *Li* and granting deference to the State Department's opinion on interpretation of the treaty).

These decisions make clear that, without the guidance of this Court, other United States courts will continue to follow the outdated reasoning of the *Li* Court, or will, like the Court of Appeals here, find themselves bound by prior circuit precedent. Mexico respectfully asks that this Court grant the petition and instruct the lower courts that the ICJ's interpretation of Article 36 as granting individual rights supersedes prior jurisprudence to the contrary, and is binding as a matter of international and domestic law.

IV. The United States Has a Significant Interest in Ensuring Respect for the Rights of Consular Protection.

As this Court has taught, "international law is founded upon mutuality and reciprocity." *Hilton v. Guyot*, 159 U.S. 113 (1895). The United States has specifically recognized this with respect to the Vienna Convention, stating that:

> [B]ecause these treaty obligations are the law of the land, we need to comply with them.... These obligations were all entered into as part of a very aggressive effort of the United States Government to protect American citizens abroad. To get protection for Americans abroad in our treaties, it was necessary to provide reciprocal protections to foreign nationals in the United States. We obviously can't insist that other countries comply and then not comply ourselves. So it is both right and fair that we comply.

U.S. State Dep't Legal Adviser William H. Taft IV, Remarks to the Nat'l Assoc. of Att'ys General (Mar. 20, 2003), *available at* http://usinfo.state.gov/dhr/Archive/2003/Oct/09-464655.html.

As a close neighbor and treaty partner of the United States, Mexico fully appreciates that the United States has long been one of the most vigorous advocates of strict compliance with the Vienna Convention. The United States represented to the International Court of Justice in the *Avena* proceedings that it has undertaken a broad program of education and support in order to increase compliance with these important rights within the United States. *Avena* Judgment, para. 147; *see also LaGrand* Judgment, para. 128(6). Abroad, United States consular officials regularly invoke and depend on their right to render consular assistance in order to protect the interests of United States citizens. *See* LUKE T. LEE, CONSULAR LAW & PRACTICE 143-51 (2d ed. 1991) (noting that U.S. consular officials have invoked these rights in the cases of Americans detained in Russia, Syria, and El Salvador, among other countries).

It should be clear, however, that if the United States fails to observe its obligations under the Vienna Convention, or fails to observe a judgment rendered under the authority of the Optional Protocol to that Convention, that failure would give other countries reason to ignore their own obligations to the United States and its citizens. As Judge Butzner of the United States Court of Appeals for the Fourth Circuit recognized, the "freedom and safety" of American citizens abroad would be "seriously endangered if state officials fail to honor the Vienna Convention and other nations follow their example." *Breard v. Pruett*, 134 F.3d 615, 622 (4th Cir. 1998) (Butzner, J., concurring). Judge Stephen Schwebel, former United States Judge and President of the International Court of Justice, made the same point when he stated in an earlier case involving the Vienna Convention that "the citizens of no State have a higher interest in the observance of [Vienna Convention] obligations than the peripatetic citizens of the United States." Vienna Convention on Consular Relations (Para. v. U.S.), 1998 I.C.J. 248, 259 (Provisional Measures Order of Apr. 9) (declaration of President Schwebel).

Indeed, when Mexico filed the *Avena* case in the International Court of Justice to protect its nationals who had been condemned to death in criminal proceedings in a foreign state, it did exactly what the United States had done when it filed the *Tehran Hostages* case in the ICJ in order to protect its citizens who had been unlawfully taken hostage by Iranian militants in the course of the Iranian Revolution. *See* United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1979 I.C.J. 7 (Provisional Measures Order of Dec. 15); 1980 I.C.J. 3 (Judgment of May 24) (the "*Tehran Hostages* case"). In the *Tehran Hostages* case, the United States relied on the very treaty, the Vienna Convention on Consular Relations, on which Mexico relied in *Avena*, and it founded the Court's jurisdiction on the very same instrument, the Optional Protocol to the Vienna Convention, on which Mexico proceeded in *Avena*.

In asking this Court to abide by the *Avena* Judgment, Mexico is doing exactly as the United States did with respect to the judgment in the *Tehran Hostages* case. The United States did not treat the Court's judgment as a hortatory suggestion, but instead repeatedly insisted that Iran had a legal obligation to comply with the Court's decision. *See, e.g.*, Memorial of the Government of the United States of America at 187-188, (U.S. v. Iran) (1979) ("[A judgment of the Court] ensure[s] recognition of a situation at law, once and for all and with binding force as between the Parties, so that the legal position thus established cannot again be called in question.").

The United States leads by example. Just as it invoked the rule of law to protect its own nationals abroad, it should abide by the rule of law when the interests of foreign nationals in the United States are at stake. This Court should uphold the promises the United States made to Mexico and the world community by granting review of Mr. Medellín's petition, and ordering the review and reconsideration mandated by the International Court of Justice in the *Avena* case.

CONCLUSION

Amicus curiae the Government of Mexico respectfully urges this Court to grant Mr. Medellín's petition for certiorari.

Respectfully submitted,

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(3)

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IN THE

Supreme Court of the United States

JOSE ERNESTO MEDELLIN,

Petitioner,

v.

DOUG DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF INTERNATIONAL LAW EXPERTS AND FORMER DIPLOMATS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE*

Amici are professors and scholars of law expert in international law and the application of international law by courts in the United States, and former U.S. diplomats.[1] (A List of *Amici* is set forth in the Appendix.) *Amici* have expertise concerning international tribunals, including the International Court of Justice (ICJ), and on the positions of the U.S. Department of State with respect to the ICJ. *Amici* seek to present their views concerning the significance of a final judgment of the ICJ interpreting a treaty of the United States, and the respect that should be accorded such an interpretation by courts in the United States, in the context of a petition to allow review and reconsideration of a conviction and death sentence.

Amici limit their position to questions concerning the ICJ judgment interpreting the consular treaty involved in the present case. They do not take a position on the death penalty as such; indeed, *Amici* occupy diverse points on the spectrum of opinion about the death penalty, as well as on other political controversies. They are united on the view that the United States is bound to comply with the ruling of the ICJ on the treaty at issue, and that the federal judicial power is the organ to bring about such compliance.

SUMMARY OF ARGUMENT

Petitioner is one of 49 Mexican nationals currently on death row in state courts in the United States, who are covered by the final judgment of the International Court of Justice (ICJ) in *Avena and Other Mexican Nationals*, 2004 ICJ 128. All those covered by *Avena* are similarly situated, in that they were not advised in a timely manner of their rights under the Vienna Convention on Consular Relations to contact the Mexican consular post, were convicted and sentenced to death without benefit of timely consular services, and have been held by the ICJ to be entitled to review and reconsideration of their convictions and sentences as a remedy for this treaty violation.

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[1] No party other than *Amici* and their counsel authored this brief in whole or in part, and no person or entity, other than *Amici* and their counsel, has made a monetary contribution to the preparation or submission of this brief. Both parties have granted consent to the filing of this *amicus curiae* brief. Letters of consent are on file with the Clerk of the Court.

In light of *Avena*, which is binding on the United States, this Court should revisit its per curiam ruling in *Breard v. Greene*, 523 U.S. 371 (1998), to clarify that a federal remedy is available to implement this treaty right.

The court below believed itself constrained to deny the relief that the ICJ has now found to be required to redress the treaty violations in *Avena*, by virtue of this Court's previous denial of such relief in *Breard*. When this Court considered Vienna Convention claims of which the ICJ had been seized in *Breard* and in *Federal Republic of Germany v. United States*, 526 U.S 111 (1999) [*LaGrand*], the ICJ orders in question were not final judgments, whose binding force is unquestioned, and the petitions were brought to this Court imminently before the scheduled executions, with inadequate opportunity for full briefing. Thus this Court has never given plenary consideration to the issues raised in this petition and should do so now.

Avena resulted from a treaty-based judicial process to which the United States fully consented, in which the United States fully participated, and which binds the United States as a whole. It interprets a multilateral treaty which protects U.S. nationals abroad as well as foreign nationals here. The United States consented to the jurisdiction of the ICJ to decide this dispute and is obliged under Article 94 of the U.N. Charter, Article 59 of the ICJ Statute, and the Vienna Convention and its Optional Protocol - four treaties in force for the United States - to carry out *Avena*. All state and federal courts need to exercise their judicial powers within their respective jurisdictions consistently with the authoritative interpretation of the Vienna Convention given in *Avena*.

The petition should be granted to resolve an unsettled important question of federal law involving the national interest in treaty compliance, as to which the lower courts are divided and much in need of this Court's instruction. In view of the confusion in the courts below about the per curiam *Breard* holding, this Court should allow plenary review to prevent a misinterpretation of its prior ruling from obstructing U.S. compliance with obligations under four treaties.

ARGUMENT

I. THE ICJ JUDGMENT ESTABLISHES A TREATY RIGHT TO REVIEW AND RECONSIDERATION OF PETITIONER'S CONVICTION AND SENTENCE.

Petitioner's case is typical of the 49 Mexican nationals currently on state death rows who are covered by the final judgment of the International Court of Justice (ICJ) in *Avena and Other Mexican Nationals* (Mexico v. United States), 2004 ICJ 128 [*Avena*]. All those covered by *Avena* are Mexican nationals who were not advised in a timely manner of their rights under the Vienna Convention on Consular Relations, April 24, 1963, 21 U.S.T. 77, TIAS 6820, 596 UNTS 261 [Vienna Convention], to contact the Mexican consular post after their arrest. They were all convicted and sentenced to death without benefit of their treaty right to timely consular assistance, and they have all been held by the ICJ to be entitled to review and reconsideration of their convictions and sentences as a remedy for this treaty violation. Petitioner's case is further typical in that the treaty claim was held to be procedurally defaulted for federal habeas purposes, notwithstanding the ICJ's binding ruling that the application of a procedural default rule to foreclose consideration of treaty claims is itself a violation of the Vienna Convention. This petition thus presents a proper vehicle to clarify the import of a final and binding judgment of an international court establishing the authoritative interpretation of a treaty, in respect of foreign nationals protected by the treaty whose rights are directly addressed in the judgment.

On June 29, 1993, José Ernesto Medellin, aged 18, was arrested in Texas and was subsequently charged with murder. Though he told the arresting officer and detaining officials that he had been born in Mexico and was not a U.S. citizen, the authorities did not inform him of his rights under the Vienna Convention at any time before his trial, conviction, and sentencing. In 1994, Medellin was convicted of murder and sentenced to death. Mexican consular officials learned of his detention only after he wrote to them from death row in 1997. Medellin thus had no opportunity to secure help from the Mexican consulate before and during trial.

The failure to inform Medellin of his consular rights "without delay" constituted a breach of the Vienna Convention.

The violation of the Vienna Convention in Medellin's case, and the refusal of the Texas courts and federal courts to consider the remedial aspects of this breach of treaty,[2] gave rise to a dispute between Mexico and the United States. As it is entitled to do under the Optional Protocol to the Vienna Convention Concerning the Compulsory Settlement of Disputes, April 24, 1963, 21 U.S.T. 325, TIAS 6820, 596 UNTS 487 [Optional Protocol], Mexico brought an application against the United States at the ICJ . After full briefing by both parties and an oral hearing held in December 2003, the ICJ entered a final judgment that specifically held in respect of Medellin:

> (1) that the United States committed breaches of the obligation . . . to inform detained Mexican nationals of their rights under [Art. 36(1)(*b*)], in the case of the following 51 individuals: . . . Medellin (case No. 38) . . . ;
>
> (2) that the United States committed breaches of the obligation . . . to notify the Mexican consular post of the detention of the Mexican nationals listed in subparagraph (1) above . . . ;
>
> (4) that the United States . . . also violated the obligation . . . to enable Mexican consular officers to arrange for legal representation of their nationals in the case of the following individuals: . . . Medellin (case No. 38). . . .

Avena, ¶ 106. The ICJ has further specifically held that the appropriate reparation for these breaches "consists in the obligation of the United States of America to provide, by means of its own choosing, review and reconsideration" of his conviction and sentence. Ibid., ¶ 153(9).

Prior to *Avena*, the U.S. District Court for the Southern District of Texas denied Medellin's federal habeas corpus petition, finding that the Vienna Convention claim was procedurally defaulted under "an adequate and independent state procedural rule," and on the alternative ground that under Fifth Circuit precedent the Vienna Convention does not create individually enforceable rights and that no judicial remedy is available for its violation. These district court conclusions of law are inconsistent with *Avena* and merit correction by this Court. In *Avena*, the ICJ explained that while the procedural default rule in itself does not violate Article 36, particular applications of the rule can violate the Convention, namely when a breach of Article 36(1) through failure to inform the individual of his rights precluded the exercise of his or his country's treaty rights. *Avena*, ¶¶ 111-113. The ICJ also held in *Avena* that the Vienna Convention gives rise to individual rights and that a judicial remedy of review and reconsideration of a conviction and sentence is required to redress the violation of such rights. *Avena*, ¶¶ 128-134, 140, 153. The *Avena* Judgment thus determined Mr. Medellin's treaty claim favorably.

After *Avena*, the Fifth Circuit affirmed the district court's denial of relief, finding that notwithstanding *Avena*, it was constrained to follow *Breard* and previous Fifth Circuit precedent, unless and until this Court (or the Fifth Circuit en banc) were to decide otherwise.

Meanwhile, in another post-*Avena* case, the Oklahoma Court of Criminal Appeals vacated a conviction and death sentence and remanded for review and reconsideration in implementation of *Avena*. *Torres v. Oklahoma*, No. PCD-04-442 (Okla. Crim. App. May 13, 2004). Lower courts have thus reached opposite conclusions about the effects of *Avena* in the first two of the 51 cases to be decided in its aftermath. The Oklahoma court in *Torres* correctly followed the authoritative treaty interpretation in *Avena*, while the Fifth Circuit perpetuated and compounded the treaty violation committed by the Texas authorities and added an independent violation by refusing to give effect to the binding *Avena* judgment.

This Court should grant certiorari to resolve this conflict in the lower courts about the legal effects of an ICJ judgment interpreting the Vienna Convention and to clarify or reconsider its own *Breard* per curiam order in light of the authoritative treaty interpretation in *Avena* adjudicating petitioner's own rights (Sec. II). On certiorari, this Court should confirm the existence of federal judicial power to fulfill the treaty obligations of the United States (Secs. III-IV).

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[2] On March 26, 1998, Medellin filed a state application for habeas corpus, arguing that his conviction and sentence should be vacated as a remedy for the treaty violation. The state court denied the application, finding that the treaty claim had been procedurally defaulted.

II. THIS COURT SHOULD REVISIT ITS PER CURIAM RULING IN *BREARD* IN LIGHT OF THE ICJ'S AUTHORITATIVE TREATY INTERPRETATION IN *AVENA*.

In *Breard*, this Court accepted that it should "give respectful consideration to the interpretation of an international treaty rendered by an international court with jurisdiction to interpret such. . . ." 523 U.S. at 375. Nonetheless, in a procedural posture not conducive to plenary consideration of the important issues at stake, the Court went on to interpret Vienna Convention Article 36 in a manner that turned out to be inconsistent with the interpretation that the ICJ would later give in *LaGrand* (F.R.G. v. U.S.), 2001 ICJ 104, and in *Avena*. The Court observed that it was "unfortunate that this matter comes before us while proceedings are pending before the ICJ that might have been brought to that Court earlier." 523 U.S. at 378. That matter came to this Court only a few days before Breard's scheduled execution date;[3] the treaty issues had not been briefed on the merits at either the ICJ or this Court; and the ICJ order in question was a provisional measures order whose effect was disputed,[4] rather than a final judgment whose binding force is clearly established by the U.N. Charter and the ICJ Statute (Sec. III.B). By contrast, the present matter has had the benefit of full briefing at the ICJ with full U.S. participation, and the final judgment constitutes an authoritative interpretation of the treaty. Plenary treatment by this Court is warranted to reconsider those aspects of *Breard* that may have been based on what has subsequently been determined to be an incorrect interpretation of the treaty, as well as to revisit important questions of treaty compliance that were either not resolved or addressed insufficiently by *Breard*.

The per curiam ruling in *Breard* summarily concluded that a habeas petitioner alleging a Vienna Convention violation has no remedy on a procedurally defaulted claim. 523 U.S. at 376. The subsequent ICJ rulings in *LaGrand* and *Avena* have undercut this aspect of *Breard*. Nor did this Court consider in *Breard*, as it normally does in cases of arguable conflict between international law and otherwise applicable domestic law, whether a harmonizing construction could be found that would enable the United States to comply with its international obligations. By contrast, just last Term this Court reaffirmed the presumption of *Murray v. Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804) that "an Act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." Cf. *F. Hoffmann-LaRoche Ltd. v. Empagran, S.A.*, 124 S.Ct. 2359, 2366 (2004) (rule of statutory construction applied in *Empagran* reflects principles of international law – "law that (we must assume) Congress ordinarily seeks to follow"); *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 815 (1993) (Scalia, J., dissenting). Summary denial of the *Breard* petition therefore cut off exploration of alternative constructions or mechanisms that might have enabled fulfillment of U.S. treaty obligations.

The foreshortened time frame for addressing the *Breard* petition likewise left unaddressed the important questions of federal law that would arise if responsibility for redressing treaty violations were left exclusively in state hands, beyond federal judicial power to correct, despite the national interest in compliance. The per curiam order in *Breard* intimated that the state governor was the organ of treaty compliance of last resort[5] – a result that would appear at odds with the proper understanding of federal-state competence in treaty cases, and a reasoning that should not be extended beyond *Breard* to the *Avena* category of treaty rights confirmed by a final and binding international judgment. The court below surely adopted an excessive interpretation of *Breard* in concluding that *state* procedural default rules could cut off the exercise of a federal treaty right, especially when the authoritative international interpreter of the treaty has determined that such applications of procedural default rules are themselves treaty violations. Federal courts do not lack jurisdictional power to correct such state violations.

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[3] The *LaGrand* matter, filed the year after *Breard*, was presented to this Court only two hours before petitioner's scheduled execution. See 526 U.S. 111 (1999).

[4] The ICJ later held that provisional orders are binding. See *LaGrand*, 2001 ICJ 104.

[5] 523 U.S. at 378.

Since *Breard*, this Court has addressed the considerations that properly inform the allocation of authorities between state and national levels in respect of foreign relations, as well as those affecting federal jurisdictional power in foreign relations cases. These post-*Breard* rulings, all rendered after plenary briefing and considered deliberation, counsel respectful attention to *Avena* here.

In *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000), which invalidated a state law, this Court noted that European states and Japan had lodged complaints at the World Trade Organization against the state measure, and that the national government had been embroiled for some time in an international dispute settlement procedure. 530 U.S. at 383.[6] *A fortiori*, in the face of a final binding judgment from a treaty-based dispute settlement procedure, a state rule must not impede compliance.

In *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2763, 2767 (2004), this Court distinguished between rights under a treaty that the political branches have declared to be non-self-executing, and those under a self-executing treaty. Federal judicial enforcement of self-executing treaties is to be expected, and the same should follow for implementation of authoritative international interpretations of self-executing treaties. Since the political branches have consistently treated the Vienna Convention as self-executing (Sec. IV.A), the logic of *Sosa* favors federal judicial enforcement of the treaty.[7]

The construction of the federal habeas statute in *Rasul v. Bush*, 124 S. Ct. 2686 (2004), suggests that this Court should not leave petitioner without a judicial remedy. In *Rasul*, even the strenuous opposition of the Executive to the availability of habeas relief did not persuade this Court that the courthouse door should be closed to foreign petitioners claiming rights under federal law. As in *Rasul*, where treaty commitments and the international reputation of the United States as a law-abiding nation were at stake, this Court is the ultimate forum to determine the availability of a judicial remedy for federally protected rights. The Court should thus grant certiorari to decide whether a federal habeas remedy is available to a petitioner invoking a treaty right that an international tribunal has determined to be well-founded.

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[6] Those WTO petitions had been suspended by consent. 530 U.S. at 383. There was no final international judgment, as there is here.

[7] The *Sosa* Court did not decide whether availability of international tribunals might affect enforceability of an international law claim in U.S. courts, but said it "would certainly consider" the potential relevance of international remedies "in an appropriate case." 124 S. Ct. at 2766 n. 21.

Amici believe that upon plenary review, this Court should grant the petition on the merits, for the reasons below. But whether the Court ultimately endorses that reasoning or some other is less important than plenary consideration. At the end of the day, this Court's decision on the merits will make it possible to know with certainty at what level of government, or with which organ, the responsibility for treaty compliance lies.

III. THE ICJ JUDGMENT RESULTED FROM A TREATY-BASED JUDICIAL PROCESS TO WHICH THE UNITED STATES AGREED AND WHICH BINDS THE UNITED STATES AS A WHOLE.

Amici respectfully draw the attention of this Court to the fully consensual nature of the obligations undertaken when the United States agreed by treaty to the rules of consular law in the Vienna Convention and to the Optional Protocol's system for binding settlement of disputes thereunder. The United States is free not to enter into treaties, and is free not to accept optional dispute settlement clauses; but once having given consent to a treaty and to a treaty-based dispute settlement provision, the United States is bound to comply with the obligations to which it has agreed.

A. The Vienna Convention Is a Consular Treaty Negotiated and Concluded by the United States to Advance Protection of U.S. Nationals Abroad.

The Vienna Convention codifies into multilateral treaty law a body of rules that evolved over centuries. Until the 1960s, consular practice was governed by customary law and bilateral treaties. While the core customary law of consular relations was generally well-understood, uncertainties persisted and disputes frequently arose. Disagreements over treatment of U.S. nationals in Mexico and Mexican nationals in the United States - including instances of denial of consular access - led to diplomatic protests and international arbitration. See 4 G. Hackworth, Digest of International Law 830-837 (1942) [Hackworth]; M. Whiteman, Digest of International Law, vol. 7 at 626-658; vol. 8 at 807-837 (1970).

In the 1920s, a U.S.-Mexican Claims Commission (established by treaty to resolve disputes involving treatment of nationals) considered claims of several U.S. nationals for having been arrested in Mexico and detained without access to a consular office. In respect of the opportunity to communicate with the consulate, the Commission held that "a foreigner, not familiar with the laws of the country where he temporarily resides, should be given this opportunity." *Walter H. Faulkner* (United States v. Mexico), Opinions of the Commissioners Under the Convention Concluded September 8, 1923 (1927) at 86, 90; see also 4 Hackworth 830. Conversely, in an incident where Mexico complained that California officials had not given the Mexican consulate access to a Mexican citizen detained in a California jail, the Department of State stressed the importance of California's compliance with the standards maintained by the United States in its dealings with other countries:

> Even in the absence of applicable treaty provisions this Government has always insisted that its consuls be permitted to visit American citizens imprisoned throughout the world and it is believed that if [the] attitude [of the] District Attorney is maintained in instant case there will be repercussions in Mexico and perhaps other countries unfavorable to American citizens.

4 Hackworth 836.

By the middle of the 20th century, the desirability of a multilateral treaty to codify consular law and provide for settlement of consular disputes was clear. Treaty codifications of customary international law not only produce greater certainty in the rules governing state behavior, but also enjoy a clearer status than uncodified custom in many legal systems.

A multilateral mechanism for binding settlement of consular disputes would strengthen compliance with consular law and avoid or mitigate the kinds of problems that the examples from U.S.-Mexican practice illustrate; it would also obviate the need for special arbitration agreements in consular disputes.

Codification of the rules of consular law was undertaken by the U.N. International Law Commission [ILC]. See 1961-II Y.B. Int'l L. Comm'n 88-128. A diplomatic conference on the ILC draft resulted in the Vienna Convention, which was opened for signature on April 24, 1963, and entered into force on March 19, 1967. See Report of the United States Delegation to the Vienna Conference on Consular Relations, reprinted in Sen. Exec. E, 91st Cong., 1st Sess., May 8, 1969, at 41, 59-61 [Report of U.S. Delegation]. The Vienna Convention has 166 parties as of 2004. See Status of Multilateral Treaties Maintained by the U.N. Secretary-General, available at http://untreaty.un.org [Status of Multilateral Treaties].

The United States played a leading role in the Vienna conference and in the negotiations over the specific wording of Article 36 of the Vienna Convention and the Optional Protocol. See Report of U.S. Delegation at 41, 59-61. Indeed, the United States proposed the provision on dispute settlement that became the Optional Protocol. See Report of U.S. Delegation at 72-73. Not only did the United States initiate and actively advocate the proposal for binding dispute settlement, but it resisted others' efforts to eliminate or weaken the dispute settlement provisions. See Report of U.S. Delegation at 73. The formulation from the Vienna Conference, fully supported by the United States, was an Optional Protocol on compulsory dispute settlement that states would be free to accept or not; upon acceptance, a binding obligation would be created. Ibid. As discussed below, the United States voluntarily accepted the Optional Protocol when it ratified the Vienna Convention in 1969. As of 2004, 46 states have become parties to the Optional Protocol. See Status of Multilateral Treaties.

The Vienna Convention dispute settlement system promotes a uniform and high level of compliance among the treaty parties. *Avena*, ¶ 47. It is axiomatic that no state can unilaterally determine the meaning of an international treaty. See *Jesse Lewis (The David J. Adams) Claim* (U.S. v. Gr. Br., 1921), 6 U.N. Rep. Int'l Arb. Awards 85 (decision of British court could not be conclusive of meaning of U.S.-British treaty; arbitral tribunal had competence to interpret the treaty authoritatively). Thus, in a dispute over the meaning of the Vienna Convention, the United States cannot impose its own interpretation on its treaty partners,[8] or establish the measure of its own treaty compliance. For the same reason, disputes over the application of the Vienna Convention to particular facts, or over the remedy for breach of the Convention, cannot be determined by the United States as one party to the dispute. For authoritative resolution of such disputes, the Optional Protocol confers jurisdiction on the ICJ.

Refusal to grant review and reconsideration of Medellin's conviction and sentence as required by the ICJ would compound the treaty violation that occurred when the Texas authorities failed to inform Medellin of his right to communicate with the Mexican consulate. Such a refusal to accord this treaty-based remedy for a treaty violation would undermine the U.S. ability to insist on compliance by other states with their obligations under the Vienna Convention toward the millions of U.S. nationals who visit or work in Mexico and in the other 164 parties to the Convention.

B. The United States Fully Consented to ICJ Jurisdiction to Decide This Dispute, Within the Framework of the U.N. Charter and ICJ Statute.

Amici respectfully emphasize that the United States freely agreed to the compulsory jurisdiction of the ICJ to resolve Vienna Convention disputes, and thus voluntarily accepted a binding obligation to carry out the resulting judgment. The basis for the compulsory jurisdiction of the ICJ over this

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[8] For this reason, U.S. courts ought to give careful consideration to reasoned positions of other courts – foreign or international – on points of treaty interpretation. Cf. *Olympic Airways v. Husain*, 124 S. Ct. 1221, 1232 (2004) (Scalia, J., dissenting). Where a tribunal has been accepted by the U.S. political branches as the forum for binding settlement of treaty disputes, deference to its judgment is not just advisable but required.

dispute is Article I of the Optional Protocol.[9] The United States has consented through the proper processes under domestic and international law both to submit Vienna Convention disputes to ICJ jurisdiction, and to comply with the ICJ's judgment in a matter interpreting a treaty with an agreed dispute settlement protocol.

The ICJ is the "principal judicial organ of the United Nations." U.N. Charter, 59 Stat. 1031, T.S. 993, art. 92. It functions according to the Statute of the ICJ, 59 Stat. 1055, T.S. 993 [ICJ Statute], which is annexed to the U.N. Charter and is an integral part thereof. According to Article 93 of the Charter, all U.N. members are *ipso facto* parties to the ICJ Statute. Under Article 94(1) of the Charter, "[e]ach Member of the United Nations undertakes to comply with the decision of the [ICJ] in any case to which it is a party." Under Article 59 of the ICJ Statute, decisions of the Court have "no binding force *except between the parties and in respect of that particular case*" (emphasis added); thus, as between the United States and Mexico in respect of the *Avena* case (which includes the Medellin matter), the decision of the ICJ is indeed binding. The United States accepted the duty to comply with ICJ judgments by ratifying the U.N. Charter and the annexed ICJ Statute as a treaty with the advice and consent of the Senate under Article II of the Constitution in 1945. The undertakings to comply with ICJ decisions and to treat them as binding remain in force as treaty obligations of the United States.

Jurisdiction of the ICJ is founded on consent and reciprocity under Article 36 of the ICJ Statute. The ICJ case involving Medellin arises under Article 36(1) of the ICJ Statute, which establishes jurisdiction over "all matters specially provided for . . . in treaties and conventions in force." The Optional Protocol is a treaty in force under Article 36(1) of the ICJ Statute. Proceedings under Article 36(1) of the ICJ Statute produce binding judgments under Article 59 of the Statute.

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[9] Article I states: "Disputes arising out of the interpretation or application of the [Vienna] Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by a written application made by any party to the dispute being a Party to the present Protocol."

It is extremely important for the United States to uphold the obligatory character of compulsory jurisdiction under the Optional Protocol and the binding nature of ICJ judgments thereunder, not only in order to uphold the integrity of commitments of international law but also because this treaty and treaty-based jurisdictional mechanism protect critical U.S. interests. The United States was the first state to invoke the Optional Protocol, when it brought an application against Iran concerning U.S. diplomatic and consular personnel who were held hostage in 1979. *United States Diplomatic and Consular Staff in Tehran* (U.S. v. Iran), 1979 ICJ 7, 1980 ICJ 3, 5, 24-26. The U.S. written and oral pleadings in that matter analyze the obligation of parties to the Optional Protocol to submit to compulsory jurisdiction when disputes arise and to abide by ICJ decisions. ICJ Pleadings, *United States Diplomatic and Consular Staff in Tehran,* at 141-152. The availability of the Optional Protocol to the United States in that case marked a major advance over the situation prior to the Vienna Convention, when the United States was unable because of the lack of preexisting jurisdictional consent to bring disputes about denial of consular access to the ICJ.[10] When the ICJ indicated provisional measures against Iran in 1979 and entered a final judgment in favor of the United States in 1980, the United States insisted on Iranian compliance and invoked the ICJ decisions in U.S. and foreign tribunals.

Approximately 70 other treaties now in force contain obligations comparable to those in the Optional Protocol for submission of treaty-based disputes to the ICJ.[11] These include bilateral and multilateral treaties involving substantial economic, political, and other interests. The United States is a frequent litigant at the ICJ, both as applicant and as respondent. Indeed, the United States has been involved in more ICJ cases than any other state:[12] in total, the United States has been party to 21 cases at the ICJ,[13] of which 10 were brought by the United States as applicant or by special agreement and 11 have been brought against the United States.[14] Since each of the 70 treaties with an ICJ dispute settlement clause entails binding obligations under those treaties and under the U.N. Charter (art. 94) and ICJ Statute (arts. 36(1) and 59), failure to carry out *Avena* could prejudice the ability of the United States to hold other states to their dispute settlement obligations.

IV. THE VIENNA CONVENTION, OPTIONAL PROTOCOL, AND *AVENA* BIND THE STATE AND FEDERAL COURTS AND MAY BE IMPLEMENTED THROUGH FEDERAL JUDICIAL ACTION.

The ICJ judgment in respect of Medellin implements a treaty obligation of the United States which is the supreme law of the land (U.S. Const. art. VI). It thus is binding on all state and federal courts. As regards a state conviction and death sentence, the responsibility for implementing this obligation belongs in the first instance to the state authorities who have competence in respect of the conviction and sentence or who have custody of the prisoner. If petitioner has exhausted state remedies and has filed a federal habeas petition, then *Avena* should be followed as the rule of decision.

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[10] In 1954 the United States filed an ICJ case against Hungary claiming denial of consular access in respect of four U.S. airmen who were tried in Hungary after their plane was brought down. *Treatment in Hungary of Aircraft and Crew of the United States of America* (U.S. v. Hung.), 1954 ICJ Pleadings 19-20, 31, 35-36. The case was dismissed because Hungary had not consented to ICJ jurisdiction. 1954 ICJ 99, 103. Hungary is now party to the Optional Protocol.

[11] See Fred L. Morrison, *Treaties as a Source of Jurisdiction, Especially in U.S. Practice,* in THE INTERNATIONAL COURT OF JUSTICE AT A CROSSROADS 58-81(Lori F. Damrosch, ed., 1987). To the best of *Amici*'s knowledge, all such treaties remain in force for the United States as of 2004, as specified for each such treaty in the Department of State publication, TREATIES IN FORCE.

[12] For a listing of all ICJ cases from 1946 to the present grouped by state, see the ICJ website at www.icj-cij.org [ICJ Website].

[13] The United States has also taken part through written statements and oral argument in almost all of the two dozen proceedings involving requests for advisory opinions under Article 65 of the ICJ Statute. See Goler Teal Butcher, *The Consonance of U.S. Positions with the International Court's Advisory Opinions,* in THE INTERNATIONAL COURT OF JUSTICE AT A CROSSROADS 423 (Lori F. Damrosch, ed., 1987); for a current listing, see ICJ Website.

[14] The cases initiated by the United States include seven involving Soviet-bloc aerial incidents. More recently, the United States invoked the ICJ in the *Tehran Hostages* case against Iran (1979-81), the *Gulf of Maine Boundary* case (Canada 1981-84), and the *ELSI* case (Italy 1987-89).

A. The Vienna Convention and Optional Protocol Are Binding Under International Law and U.S. Law Pursuant to the Senate's Advice and Consent.

Under international law, treaty relations arise by the consent of states. Once a treaty is in force for a state, that state is obliged under the rule of *pacta sunt servanda* to perform the treaty in good faith. The Senate approved the obligations of the Vienna Convention and ICJ compulsory jurisdiction over disputes under it when it gave unanimous advice and consent to ratification of the Vienna Convention and the Optional Protocol. See 115 Cong. Rec. 30997 (Oct. 22, 1969). The Vienna Convention and Optional Protocol entered into force for the United States on December 24, 1969. See RESTATEMENT (Third) of the Foreign Relations Law of the United States (1987), Intro. Note to Part III and §§ 301-312, 321; Intro. Note to Part IV, ch. 6 (preceding § 464) and § 465.

The Vienna Convention has been understood at all times to be a self-executing treaty. As the Department of State witness informed the Senate in the hearings on the Vienna Convention, "The Convention is considered entirely self-executive and does not require any implementing or complementing legislation." Statement of J. Edward Lyerly, Deputy Legal Adviser for Administration, U.S. Department of State, Before the Senate Committee on Foreign Relations, reprinted in Sen. Exec. Rep. No. 91-9, 91st Cong., 1st Sess. (1969), at 5. See also Restatement, Intro. Note preceding § 464. Likewise, there has never been the slightest doubt that the Vienna Convention would prevail over any inconsistent state law. The priority of treaty law over state law not only is required by the Supremacy Clause, but was spelled out explicitly in the State Department's responses to the Senate's questions, as follows:

> *Question. What is the effect of the convention on (a) Federal legislation; and (b) State laws?*
>
> Answer [after explaining a possible area of conflict not relevant here].

> To the extent that there are conflicts with Federal legislation or State laws the Vienna Convention, after ratification, would govern as in the case of bilateral consular conventions.

Sen. Exec. Rep. No. 91-9, at 18. This official response about the controlling effect of the Vienna Convention raised no concerns in the Senate, which gave unanimous advice and consent.

Because the Vienna Convention is a self-executing treaty, and because *Avena* specifies what is required by the Vienna Convention itself as a remedy for breaches, all aspects of the present petition are properly understood as implementation of self-executing treaty obligations.[15] Just as no legislation was required to implement the treaty obligation to inform Mexican nationals of their consular rights, no legislative action is needed to afford Medellin the treaty-based remedy that the ICJ has found to be necessary to redress the failure to inform Medellin of this right. *Avena* is thus a clarification of obligations that existed when Medellin was arrested (the obligation to inform him of his treaty rights) and subsequently when he was tried, convicted and sentenced in ignorance of his treaty rights (the treaty-based obligation to remedy the violation from failure to inform). By failing to accord this treaty-based remedy to Medellin, the court below did not fulfill its duty to ensure compliance with the Vienna Convention.

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[15] The decision in *Committee of United States Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 937-938 (D.C. Cir. 1988), which includes dicta suggesting that an ICJ judgment might not be self-executing, is distinguishable. In *Nicaragua*, the ICJ judgment did not involve a self-executing treaty, but rather entailed aspects of international law (the use of military force) that would be considered non-self-executing in U.S. law. The plaintiffs who sought to enforce the ICJ's *Nicaragua* judgment lacked any relationship to the ICJ case, see 859 F.2d 938, while *Avena* explicitly deals with Medellin and specifies the remedial dimension of his claim under a self-executing treaty. Finally, Congress and the President had repudiated the ICJ judgment in *Nicaragua* by enacting a subsequent statute in conflict with it, which the court of appeals found determinative, see 859 F.2d 936-937. Here, there is no statute rejecting *Avena*, nor any hint that the Executive would not want compliance.

There can be no objection that *Avena* calls upon the United States to alter the manner in which state criminal jurisdiction would ordinarily be exercised.[16] Treaties may and often do require states to modify the exercise of their judicial jurisdiction, and even to refrain from exercising criminal jurisdiction. For example, the Vienna Convention codifies rules of international law granting immunities from judicial jurisdiction to consular officers, including in criminal matters. See Vienna Convention, arts. 41-45. Where a treaty provides for the immunity of a foreign official from judicial jurisdiction, state and federal courts alike are required to recognize the treaty immunity, notwithstanding any impact on state law enforcement. See *Commonwealth v. Jerez*, 390 Mass. 456, 457 N.E.2d 1105 (1983) (criminal complaint against consular officer dismissed because of Vienna Convention immunity).

B. U.S. Courts Are Required to Give Effect to Treaty-Based Rights of Foreigners.

The obligation of all U.S. judges, state or federal, to give effect to treaty-based rights of foreigners is beyond doubt[17]. In *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 236-237 (1796), this Court established that a treaty with Britain would prevail over state laws confiscating the property of British subjects:

> A treaty cannot be the supreme law of the land, that is of all the United States, if any act of a State Legislature can stand in its way. . . . – If a law of a State, contrary to a treaty, is not void, but voidable only by a repeal, or nullification by a State Legislature, this certain consequence follows, that the will of a small part of the United States may controul or defeat the will of the whole. . . .
>
> [I]t is the declared duty of the State Judges to determine any Constitution, or laws of any State, contrary to the treaty (or any other) made under the authority of the United States, null and void. National or Federal Judges are bound by duty and oath to the same conduct.

In *Asakura v. Seattle*, 265 U.S. 332, 341 (1924), this Court said:

> The treaty . . . stands on the same footing of supremacy as do the provisions of the Constitution and laws of the United States. It operates of itself without the aid of any legislation, state or national; and it will be applied and given authoritative effect by the courts.

State and federal courts have frequently upheld treaty rights, without awaiting any instruction from the federal Executive or the legislature. The Court of Appeals of Kentucky, in an opinion that this Court later called "very able" (*United States v. Rauscher*, 119 U.S. 407, 427-428 (1886)) wrote:

> When it is provided by treaty that certain acts shall not be done, or that certain limitations or restrictions shall not be disregarded or exceeded by the contracting parties, the compact does not need to be supplemented by legislative or executive action, to authorize the courts of justice to decline to override those limitations or to exceed the prescribed restrictions, for the palpable and all-sufficient reason, that to do so would be not only to violate the public faith, but to transgress the "supreme law of the land."

Commonwealth v. Hawes, 76 Ky. (13 Bush) 697, 702-703 (1878).

In *Hines v. Davidowitz*, 312 U.S. 52, 64-65 (1941), this Court emphasized:

> One of the most important and delicate of all international relationships, recognized immemorially as a responsibility of government, has to do with the protection of the just rights of a country's own

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[16] Since both Mexico and the United States are federal states, there is a strong national interest in ensuring compliance with international obligations at both state and federal levels, in both the United States and Mexico. If U.S. states were free to violate and then fail to remedy treaty violations, with no federal judicial remedy, the consequences in U.S.-Mexican relations would be severe. The United States as a whole is responsible for state violations of international law. Where U.S. courts can avoid such violations by carrying out the judgment of an international tribunal, they are required to do so.

[17] Treaties providing inheritance rights for aliens have been held to prevail over state laws. *Kolovrat v. Oregon*, 366 U.S. 187 (1961). State prohibitions on land ownership have likewise had to yield to treaties giving aliens such rights. *Chirac v. Chirac*, 15 U.S. (2 Wheat.) 259 (1817).

> nationals when those nationals are in another country. . . . [T]here has grown up in the field of international relations a body of customs defining with more or less certainty the duties owing by all nations to alien residents – duties which our State Department has often successfully insisted foreign nations must recognize as to our nationals abroad.

This Court there invalidated a state measure "in a field which affects international relations, the one aspect of our government that from the first has been most generally conceded imperatively to demand broad national authority." 312 U.S. 67. This Court has repeatedly affirmed the need to undertake a "searching scrutiny" of state or local actions affecting U.S. foreign relations that may provoke consequences for the nation as a whole. See, e.g., *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 451 (1979). Where the ICJ has entered a final judgment requiring review and reconsideration of a state conviction and death sentence as the remedy for violation of a treaty, no court in the United States is free to ignore the treaty-based judgment in favor of the foreigner.

CONCLUSION

Amici urge this Court to ensure that actions of the authorities in Texas do not cause irreparable damage on the international plane. Review and reconsideration of Medellin's conviction and sentence is necessary to avoid the adverse consequences that would result from failure to comply with this treaty obligation. Such consequences could include refusal of other parties to the Vienna Convention to ensure the treaty-based rights of U.S. nationals abroad, as well as prejudice in connection with dispute settlement under this and other treaties. This Court should revisit its per curiam ruling in *Breard* in order to ensure compliance with the treaty obligations of the United States. By instructing the courts below to afford the remedy of review and reconsideration required to redress the treaty violation, this Court will fulfill its responsibility within our constitutional system and will maintain the standard for compliance with international obligations that is critical to protect U.S. interests abroad.

Respectfully submitted,

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APPENDIX

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Jeffrey Davidow is the president of the Institute of the Americas at the University of California, San Diego. He served as U.S. ambassador to Mexico from 1998 to 2002, under both President Clinton and President Bush. From 1996 to 1998, he was Assistant Secretary of State for Inter-American Affairs. After 34 years in the State Department, he retired as America's highest-ranking diplomat, one of only three people to hold the personal rank of career ambassador

Richard N. Gardner is Professor of Law and International Organization at Columbia University and was previously U.S. ambassador to Italy and Spain. As Deputy Assistant Secretary of State for International Organization Affairs, he was involved in the U.S. position in *the Certain Expenses of the United Nations* advisory opinion proceeding, 1962 ICJ 163. He served as counsel for the United States at the ICJ in the *Elettronica Sicula S.p.A. (ELSI)* case, 1989 ICJ 15.

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Jim Jones served in the U.S. Congress representing Oklahoma from 1973 to 1987. He was Chairman of the House Budget Committee and a ranking member of the Ways and Means Committee. He served as U.S. ambassador to Mexico from 1993 to 1997, and was awarded by President Ernesto Zedillo the Aztec Eagle award, the highest honor that can be given to a non-Mexican. From 1989 to 1993, he was Chairman and Chief Executive Officer of the American Stock Exchange.

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Andreas F. Lowenfeld is the Herbert and Rose Rubin Professor of International Law at New York University School of Law. He served in the Office of the Legal Adviser of the U.S. Department of State between 1961 and 1966 and was Deputy Legal Adviser from 1964 to 1966. He was Associate Reporter for the American Law Institute's *Restatement (Third) of the Foreign Relations Law of the United States* and acted as counsel for the United States in the *Oil Platforms* (Iran v. United States) case, 1996 ICJ 803, 2003 ICJ.

Bernard H. Oxman is Professor of Law at the University of Miami School of Law and a former Assistant Legal Adviser of the U.S. Department of State. He was a legal consultant for the United States in the *Gulf of Maine Boundary* case, 1984 ICJ 246.

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Stephen M. Schwebel was a judge of the International Court of Justice from 1981 to 2000 and its president from 1997 to 2000. Previously he served for fourteen years in the Office of the Legal Adviser of the U.S. Department of State, including as Assistant Legal Adviser and Deputy Legal Adviser, in which offices he represented the United States in the *Certain Expenses of the United Nations* advisory opinion proceeding, 1962 ICJ 163; the *Case Concerning United States Diplomatic and Consular Staff in Tehran*, 1979 ICJ 7, 1980 ICJ 3; and in the advisory opinion proceeding on *Interpretation of the Agreement of 25 March 1951 between the World Health Organization and Egypt*, 1980 ICJ 73.

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No. 04-5928

IN THE
Supreme Court of the United States

JOSE ERNESTO MEDELLIN,
Petitioner,

v.

DOUG DRETKE, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF *AMICUS CURIAE* OF AMBASSADOR BRUCE LAINGEN, *ET AL.*, IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amici are either U.S. citizens who have benefited from consular assistance abroad or have suffered in its absence; attorneys or diplomats familiar with the importance of consular assistance; or organizations dedicated to the interests of U.S. citizens abroad.

Ambassador L. Bruce Laingen served in the United States Foreign Service from 1949 to 1987. His tours of service included assignments in Germany, Iran, Pakistan, and Afghanistan. He served as U.S. Ambassador to Malta from 1977-1979. In mid-1979, he returned to Iran for a second term as Chargé d'Affaires of the American Embassy before being held hostage in the Iran Hostage Crisis from November 4, 1979 to January 20, 1981. During the Hostage Crisis, the United States sought and secured a judgment against Iran from the International Court of Justice based on Iran's violation of the Vienna Convention on Consular Relations. Ambassador Laingen holds the Award for Valor from the Department of State, as well as the Distinguished Public Service Medal from the Department of Defense.

Billy Hayes is a filmmaker, producer and writer based in Los Angeles, California. Mr. Hayes spent five years in a Turkish prison during the 1970s, an ordeal described in his book, *Midnight Express*, which was made into a feature motion picture by the same name. Prompt notification of the

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[1] Counsel for all parties have consented in writing to the filing of this brief, and *amici* have filed those consents with the Clerk of the Court. No counsel for a party in this case authored this brief in whole or in part, and no person or entity, other than the undersigned *amici* and their counsel, has made a monetary contribution to this brief's preparation and submission.

U.S. Consulate ensured that Mr. Hayes was able to retain a lawyer, while regular consular visits throughout his incarceration provided an essential and reliable link to the outside world.

Richard Atkins practices law in Philadelphia, Pennsylvania, and has specialized for more than twenty years in assisting American citizens who run afoul of the law in foreign countries. He has testified before the Senate Foreign Relations Committee on international prisoner transfer agreements and wrote a guide to prisoner transfer treaties for the United Nations. Approximately a thousand incarcerated Americans abroad have been freed or returned with his assistance.

William D. Rogers served as Assistant Secretary of State for Inter-American Affairs from 1974-1976, and Under Secretary of State for Economic Affairs from 1976-1977. During his lengthy career as a diplomat, he played a key role in Secretary of State Kissinger's negotiations to end white rule in Rhodesia (now Zimbabwe), participated in the final Panama Canal Treaty negotiations, was special emissary for President Carter to El Salvador in 1980, co-chaired the Bilateral Commission on the Future of U.S. Mexican Relations, and was Senior Counsel to the National Bipartisan Commission on Central America. He has also served as President of the Center for Inter-American Relations in New York, and as President of the American Society of International Law.

Founded in Geneva in 1978, **American Citizens Abroad** (ACA) is a non-profit, non-partisan organization dedicated to serving and defending the interests of U.S. citizens living outside the United States. ACA works closely to assist the U.S. Government in developing cohesive national policies dealing with Americans overseas. The organization has members in over 90 countries worldwide.

The **Federation of American Women's Clubs** overseas (FAWCO) is a non-partisan network of 74 independent organizations in 33 countries around the world, with over 17,000 members. FAWCO is non-profit U.S. corporation and a recognized NGO with special consultative status to the UN Economic and Social Council. Among its stated purposes is to defend the rights of Americans overseas.

Amici stress that we take no position in this brief on the moral or legal propriety of capital punishment in the abstract, or whether a sentence of death is an appropriate sanction for Mr. Medellin. Some of the *amici* are opposed to the death penalty, and some are not. All are in agreement, however, that the failure by the lower court to give a vigorous and robust scope to the protections of the Vienna Convention on Consular Relations will ultimately, and inevitably, endanger the welfare of United States citizens abroad.

SUMMARY OF ARGUMENT

Every year, a significant number of United States citizens traveling or living overseas find themselves ensnared in the criminal justice system of a foreign government. Consular assistance provides a vital service to these Americans, providing a desperately needed link to the outside world, and helping them navigate and understand an unfamiliar, and perhaps hostile, legal system.

The United States played a leading role in creating

Article 36 of the Vienna Convention on Consular Relations, which ensures that consular officers will be allowed to perform this important service. Article 36 obligates member states to notify detainees of their right to seek consular assistance, and to permit consular access to the detainee. But if officials in this country fail to provide foreign nationals with the full benefit of consular assistance, it is inevitable that U.S. citizens abroad will soon suffer a similar, reciprocal fate. Indeed, nothing presents a greater threat to consular assistance abroad than the failure by officials in this country to grant the reciprocal assistance at home.

The United States also played a leading role in drafting the Optional Protocol Concerning the Compulsory Settlement of Disputes, which established the compulsory jurisdiction of the International Court of Justice in disputes involving parties to the Convention. The United States has frequently recognized the International Court of Justice (ICJ) as a proper forum to adjudicate disputes between states. In fact, it has invoked the jurisdiction of the World Court more often than any country in the world. Of particular significance to this dispute, the United States brought an action in 1979, following the Tehran hostage crisis. The action challenged, *inter alia*, Iran's failure to comply with Article 36 of the Convention. Under these circumstances, the United States cannot be heard to dismiss or discount the recent judgment of the International Court of Justice in *Avena*.

The failure by the lower court to provide meaningful review and reconsideration of Mr. Medellin's conviction and sentence is inconsistent with the leading role taken by the United States in creating the Convention. It is also at odds with its steadfast determination to accept the jurisdiction of the International Court of Justice. But more ominously, if the judgment below is allowed to stand, it is inevitable that U.S. citizens abroad will soon suffer in kind.

ARGUMENT

I.

The United States Played A Leading Role In Developing The Legal Protections Provided By Both The Vienna Convention And the Optional Protocol

The United States has long recognized what can scarcely be gainsaid: the Vienna Convention on Consular Relations (Convention)[2] provides vital safeguards to persons imprisoned by a contracting State.[3] But equally clear, and no less important, is the leading role the United States played in securing these essential protections. Both the Convention and the Optional Protocol Concerning the Compulsory Settlement of Disputes (Optional Protocol)[4], are substantially the product of U.S. leadership.

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[2] April 24, 1963, 21 U.S.T. 77, 596 UNTS 261.

[3] *See, e.g.*, Memorial of the United States, *Case Concerning United States Diplomatic and Consular Staff in Tehran*, I.C.J. Pleadings 1980, p. 174 ("A principal function of the consular officer is to provide varying kinds of assistance to nationals of the sending State, and for this reason the channel of communication between consular officers and nationals must at all times remain open. Indeed, such communication is so essential to the exercise of consular functions that its preclusion would render meaningless the entire establishment of consular relations."); U.S. Department of State telegram to all U.S. diplomatic and consular posts abroad concerning consular assistance for American nationals abroad, January 1, 2001, available at http://www.state.gov/s/l/16139.htm ("Consular notification of and access to a detained or arrested U.S. citizen has long been crucial to providing basic protective services abroad. . . Protesting unreasonable delays in consular notification is not discretionary but has long been an integral element of U.S. policy to provide protective consular services to detained Americans overseas.")

For example, the Convention codified the pre-existing law on consular relations between states, an area that had previously been regulated "mainly by bilateral agreements or other less formal arrangements and by national laws."[5] In that respect, the Convention attempted to reach a global agreement on consular relations, thereby "contribut[ing] to the promotion of friendly relations between nations."[6] The United States actively participated in creating this agreement, and took a substantial part in drafting Article 36, the text of which was agreed to "after much debate."[7]

Significantly, the United States recognized even before ratification that vigorous enforcement of Article 36 would provide important reciprocal benefits to U.S. citizens overseas. The Report of the U.S. Delegation to the United Nations Conference on Consular Relations notes that Article 36(1)(b), which requires that "[arresting] authorities shall inform the person concerned without delay of his rights

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[4] April 24, 1963, 21 U.S.T. 325, 596 UNTS 487.

[5] Report of the United States Delegation to the United Nations Conference on Consular Relations, Vienna, Austria, March 4 to April 22, 1963, reprinted in S. Exec. Doc. E, 91st Cong., 1st Sess., May 8, 1969, at 41. (hereinafter "Report").

[6] *Id.*

[7] *Id.* at 59.

under this sub-paragraph,"[8] establishes a "requirement which is not beyond means of practical implementation in the United States, and, at the same time, is useful to the consular service of the United States in the protection of our citizens abroad."[9]

While the Convention therefore represents an important codification of the obligation to provide consular notification, the United States additionally recognizes that consular notification is not dependent upon the legal protections of the Convention alone:

> Consular notification is in our view a universally accepted, basic obligation that should be extended even to foreign nationals who do not benefit from the VCCR or from any other applicable bilateral agreement. Thus, in all cases, the minimum requirements are to notify a foreign national who is arrested or detained that the national's consular officials may be notified upon request; to so notify consular officials if requested; and to permit consular officials to provide consular assistance if they wish to do so.[10]

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[8] Convention, art. 36(1)(a).

[9] Report at 60. Elsewhere, the Report observes that "[t]he standard of treatment required by the present Convention conforms in all essential respects to the views of the United States as to what is or should be required by international law and practice." *Id.* at 74.

[10] Bureau of Consular Affairs, U.S. Department of State, Consular Notification and Access, Instructions for Federal, State, and other Local Law Enforcement and Other Officials Regarding Foreign Nationals in the United States and the Rights of Consular Officials To Assist Them 44 (no date of publication available, "[t]he Department of State expects to update it every 2-5 years"),

The United States likewise played an integral role in drafting the Optional Protocol, which provides in relevant part that any "[d]isputes arising out of the interpretation or application of the Convention *shall* lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the Present Protocol."[11] Indeed, this language derives substantially from the original proposal of the United States, which provided that "[a]ny dispute arising from the interpretation or application of this Convention shall be submitted at the request of either of the parties to the International Court of Justice unless an alternative method of settlement is agreed upon."[12] At the Conference, the United States voted *against* a motion by the Yugoslav delegation that would have weakened the compulsory jurisdiction of the ICJ.[13] While the final language of the Protocol is slightly different than the language proposed by the United States, it clearly provides for the compulsory jurisdiction of the ICJ, precisely as urged by the U.S.

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available at: http://travel.state.gov/law/notification5.html.

[11] Protocol, art. 1 (emphasis added).

[12] Report at 72.

[13] The Yugoslav delegation proposed adding a paragraph to the U.S. proposal, providing that "[a]ny contracting party may, at the time of signing or ratifying this Convention or of acceding thereto, declare that it does not consider itself bound by paragraph 1 [of the United States proposal]. The other contracting parties shall not be bound by the said paragraph with respect to any contracting party which has formulated such a reservation." *Id.* at 73.

That the United States would have argued so assiduously for an Optional Protocol which provided for the compulsory jurisdiction of the ICJ should come as no surprise: the United States has been involved in more cases at the ICJ than any other country in the world, and has invoked the jurisdiction of the World Court more often than any other state.[14] One such action, however, is of particular interest to *amici*.

In 1979, the United States submitted an application to the ICJ against the Islamic Republic of Iran "concerning the seizure and holding as hostages of members of the United States diplomatic and consular staff and certain other United States nationals."[15] In its application, the United States accused Iran of several treaty violations, including violations of Article 36 of the Convention, and requested that the ICJ "adjudge and declare" that Iran was under a "particular obligation immediately to secure the release of all United States nationals currently being detained."[16] The ICJ indicated provisional measures against Iran December 15, 1979, and entered a final judgment in favor of the United States May 24, 1980. Thereafter, the United States insisted the decisions of the ICJ were binding in all respects, and that Iran must comply with the Court's judgment.[17]

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[14] The official website for the ICJ lists all cases from 1946 to the present. *See* http://www.icj-cij.org/icjwww/idecisions.htm (last visited September 2, 2004).

[15] *Case Concerning United States Diplomatic and Consular Staff in Tehran (U.S.A. v. Iran)*, 1980 I.C.J. 3 (Judgment of 24 May).

[16] *Id.* at 6.

[17] *U.S. Urges the Iranians to Obey Court Decision*, New York Times,

In sum, having played a prominent role in drafting the Convention, having successfully led the international charge for the compulsory jurisdiction of the ICJ, and having sought relief from that Court more than any other country, the United States cannot be heard now to disparage or discount its judgment.

II.
Failure To Provide Vigorous And Robust Enforcement Of The Vienna Convention Could Have Grave Consequences For U.S. Citizens Abroad

In a legal system that has no independent enforcement mechanism, the integrity of the process depends on nothing less than the acceptance of mutually shared obligations. Behind this acceptance is the essential lesson of diplomatic experience: so long as they are able, nations will respond in kind to the treatment they receive. This notion of reciprocity is both an inescapable reality, and the animating force to a bedrock principle of international law – *pacta sunt servanda* ("pacts must be respected") – which captures the requirement that nations observe their agreements in good faith.[18] In matters both mundane and monumental,

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May 25, 1980, pg. 9: "The State Department said today that the decision by the International Court of Justice ordering Iran to release the American hostages and pay compensation to the United States was binding on Iran, and it called on the Teheran Government to carry out its provisions."

[18] *See, e.g.*, Restatement (Third) of Foreign Relations Law of the United States §321 cmt. a (1987)(*pacta sunt servanda* "lies at the core of the law of international agreements and is perhaps the most important principle of international law.")

membership in the international community implies a solemn obligation to comply with treaties in good faith, "undertaking to do (or not to do) unto others what they would have done (or not done) unto them."[19]

In the present context, the importance of reciprocity cannot be overstated. Over the last 30 years, the number of Americans living overseas has increased dramatically. The State Department now estimates that "[a]pproximately 3.2 million Americans reside abroad, and Americans make about 60 million trips outside the United States each year."[20] The State Department also reports that over 2,500 Americans are arrested abroad annually.[21] And this total does not include the number of citizens detained outside the formal criminal justice process. All told, roughly 6,000 Americans are arrested or detained abroad every year.[22] The largest number of these – 400 – are detained in Mexico.[23]

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[19] Louis Henkin, *How Nations Behave* 30 (2d ed. 1979).

[20] Bureau of Resource Management, U.S. Department of State, *FY 2003 Performance and Accountability Report* (2003), *available at* http://www.state.gov/m/rm/rls/perfrpt/2003/html/29037.htm.

[21] Office of Overseas Citizens Services, Bureau of Consular Affairs, U.S. Department of State, Department of State Publication 10252, *Overseas Citizens Services*, (2002), *available at* www.internationalbenefits.com/travel-tips/overseas-citizens-services.htm

[22] Kevin Herbert, *The Terrorist Threat to the American Presence Abroad: A Report of a Consultation of The Critical Incident Analysis Group and The Institute for Global Policy Research, Part II. 2. Threat to Citizens Overseas*, University of Virginia, April 12-13, 1999, *available at* www.healthsystem.virginia.edu/internet/ciag/reports/report_terr_citizens.cfm (Kevin Herbert is from the Office of Overseas Citizens Services, U.S. Department of State).

These statistics are both descriptively and normatively instructive: they demonstrate that many U.S. citizens, at one time or another, will find themselves overseas in need of legal help, and they suggest that a failure to provide foreign nationals in the United States with vigorous and robust enforcement of the Vienna Convention could have grave consequences for U.S. citizens abroad. And of course, this risk to U.S. citizens has not gone unnoticed.

The Foreign Affairs Manual instructs American consuls abroad to secure "immediate [consular] notification, no matter what the language of applicable treaties legally requires."[24] Apart from ensuring the timely provision of legal information, prompt notification and access "is necessary to forestall physical abuse of the prisoner. . . or to ascertain when such abuse has occurred."[25] American consuls are required to determine if there has been "any physical abuse or violation of rights"[26] and to look for signs of ill-treatment, bearing in mind that "many forms of physical abuse, including systematic torture, are calculated to leave no physical evidence."[27] Consular officers also

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[23] Press Statement by James P. Rubin, Spokesman, U.S. Department of State (Apr. 15, 1998), *available at* www.hri.org/news/usa/std/1998/98-04-15.std.html.

[24] U.S. Department of State Foreign Affairs Manual (1984), 7 FAM 411.3, *Relations with Local Authorities*.

[25] *Id.*, 7 FAM 412, *Access*.

[26] *Id.*, 7 FAM 414.1, *Abuse of Prisoners*.

[27] *Id.*, 7 FAM 414.1-1, *Examination by an Officer*.

arrange for detainees to be "examined by a private medical doctor to determine the extent and probable cause of any injury"[28] and observe "the physical conditions under which the prisoner is being held."[29] Finally, the consulate is required by law "to assist U.S. citizens abroad who, as a result of their incarceration, cannot secure the minimal medical treatment or dietary regimen necessary to sustain an acceptable standard of life."[30]

The State Department has repeatedly stressed to domestic officials the vital importance of reciprocal enforcement of the Convention. As Governor of Texas, George W. Bush received a letter from Secretary of State Madeleine Albright that noted:

> As Secretary of State, ensuring the protection of American citizens abroad – including over 300 imprisoned Texans last year – is one of my most important responsibilities. Our ability to provide such assistance is heavily dependent, however, on the extent to which foreign governments honor their consular notification obligations to us. At the same time, we must be prepared to accord other countries the same scrupulous observance of consular

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[28] *Id.*, 7 FAM 414.1-2, *Examination by Independent Physician in Cases of Abuse*.

[29] *Id.*, 7 FAM 414.2, *Conditions of Detention*.

[30] *Id.*, 7 FAM 451, *General Policy (Emergency Medical and Dietary Assistance)*.

> notification requirements that we expect them to accord the United States and its citizens abroad.[31]

On another occasion, Secretary Albright noted that the State Department stood ready to provide a range of assistance to Americans detained abroad, including "attempting to ensure that they understand the foreign country's legal system and their legal options, by helping them obtain qualified legal representation, by communicating with their families if they wish, and by taking other steps to improve the prisoner's situation and in some cases, to influence the outcome of the proceedings." [32] She has also cautioned that non-compliance with the orders of the International Court of Justice "could be seen as a denial by the United States of the significance of international law and the court's processes in its international relations and thereby limit our ability to insure that Americans are protected when living or traveling abroad."[33]

U.S. consular officers overseas have been instructed to insist on scrupulous observance of Article 36 rights, in

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[31] S. Babcock, *The Role of International Law in United States Death Penalty Cases*, 15 LJIL 367, 376 (2002) (quoting from Secretary Albright's letter to Governor Bush, dated November 27, 1998).

[32] Letter from Madeleine Albright, Secretary of State, to Victor Rodriguez, Chairman of the Texas Board of Pardons and Paroles, quoted in footnote 211 of the Memorial of Mexico, *Case Concerning Avena and Other Mexican Nationals*, I.C.J. Pleadings (2003), *available at* www.icj-cij.org/icjwww/idocket/imus/imusframe.htm.

[33] Linda Greenhouse, *Court Weighs Execution of Foreigner*, New York Times, April 14, 1998, page 14 (quoting from Secretary Albright's letter to Virginia Governor James Gilmore).

order to carry out their "primary mission" of protecting Americans:

> If we are to be effective in protecting the rights of U.S. citizens detained or otherwise in distress abroad, we must first know their situation and we must be vigilant in personally assisting them. By consistently protesting violations of notification and access obligations, we reinforce with the host government the seriousness with which we take our consular responsibilities and underscore our efforts to protect our citizens against any abuse, mistreatment or discrimination.[34]

Secretary Albright's position is neither surprising nor unusual. It has been consistently echoed by others at the State Department – most recently by William H. Taft, IV, the Department's Chief Legal Advisor. As he observed in a letter to the Oklahoma clemency officials presiding over the recent case of Osbaldo Torres, Article 36 of the Convention "is not only of importance to foreign nationals in the United States. It serves to protect all Americans who travel or live abroad."[35] Other State Department officials have voiced the same sentiment.[36]

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[34] U.S. Department of State telegram to all U.S. diplomatic and consular posts abroad concerning consular assistance for American nationals abroad, *supra*, fn. 3.

[35] S. Lynne Walker, *Okla. case pits U.S. against world court*, San Diego Union-Tribune, May 7, 2004 (quoting Mr. Taft's letter to the Oklahoma Pardon and Parole Board), *available at* www.signonsandiego.com/uniontrib/20040507/news_1n7penalty.html.

[36] For example, State Department Spokesman James P. Rubin stated that

Robust enforcement of the Vienna Convention is not merely the concern of cabinet level officials. On the contrary, the law of unintended consequences in this field has been the subject of frequent judicial comment. In *Standt v. City of New York*, for example, the Court observed:

> The United States has repeatedly invoked Article 36 on behalf of American citizens detained abroad who have not been granted the right of consular access. ... It is critical for the judiciary to recognize VCCR rights of foreign nationals detained in the United States for the United States to continue its success in invoking the Vienna Convention on behalf of U.S. citizens detained abroad.[37]

Judge Butzner, of the Fourth Circuit Court of Appeals, expressed a similar sentiment during the *Breard* litigation:

> United States citizens are scattered about the world – as missionaries, Peace Corps volunteers, doctors, teachers and students, as travelers for business and for pleasure. Their freedom and safety are seriously endangered if state officials fail to honor the Vienna Convention and other nations follow their example. Public officials should bear in mind that international law is founded upon mutuality and reciprocity.[38]

In another case, one jurist asked, perhaps only rhetorically,

> Why should Mexico, or any other signatory country, honor the Treaty if the U.S. will not enforce it? The next time we see a *60 Minutes* piece on a U.S. citizen locked up in a Mexican jail without notice to any

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"[c]onsular notification is no less important to [other countries] than to U.S. nationals outside the United States. We fully appreciate that the United States must see to it that foreign nationals in the United States receive the same treatment we expect for our citizens overseas. We cannot have a double standard." Press Statement by James P. Rubin, Spokesman, U.S. Department of State (Nov. 4, 1998), *available at* http://secretary.state.gov/www/briefings/statements/1998/ps981104.html. State Department Spokesman R. Nicholas Burns captured perfectly the obligation imposed by reciprocity:

> A lot of American citizens who are tourists ... find themselves in trouble, find themselves ill or in prison because they didn't understand the legal system or they came crosswise with the system, and the only people they can turn to for help are American diplomats. So it's critically important to the average American -- and millions of Americans travel overseas every year -- that they have Americans who can help them when they get into trouble. It happens all the time.

Press Statement by R. Nicholas Burns, Spokesman, U.S. Department of State (Sept. 29, 1995),
available at http://www.hri.org/docs/statedep/1995/95-09-29.std.html.

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[37] 153 F. Supp. 2d 417, 427 (S.D.N.Y. 2001).

[38] *Breard v. Pruett*, 134 F.3d 615, 622 (4th Cir. 1998)(Butzner J., concurring)(internal quotations omitted); *see also U.S. v. Carillo*, 70 F. Supp. 2d 854, 860 (N.D. Ill. 1999)("Treaty violations not only undermine the 'Law of the Land,' but also international law, where reciprocity is key. If American law enforcement officials disregard, or perhaps more accurately, remain unaware of the notification provision in Article 36, then officials of foreign signatories are likely to flout those obligations when they detain American citizens.").

> U.S. government official we ought to remember these cases.[39]

Relevant organizations, whose members will be most affected by a restrictive interpretation of the Convention, have also voiced their concern. The Southern Baptist International Mission Board, for example, oversees 4,200 missionaries and 15,000 volunteers in 130 countries. The president of the organization noted his concerns in urging former Virginia Governor George Allen to commute the sentence of an inmate on Virginia's death row. "I am horrified to think of the potential repercussions in Mexico and other countries, and its potential harm to our missionaries' that could occur because the Commonwealth of Virginia failed to honor the obligations of the Vienna Convention."[40]

And as recent events in China make plain, the danger to U.S. citizens, though perhaps more pronounced in these turbulent times, does not arise solely from the random acts of rogue states. Gao Zhan, a sociologist and permanent resident based at American University, was traveling with her young son in China when she was arrested for espionage.[41] She and

her son, an American citizen, were held *incommunicado* by China's state security ministry, without notice to the U.S. Embassy. When her husband came to China seeking information, he too was detained and threatened.[42] These events prompted the House of Representatives to pass House Resolution 160, unanimously condemning the acts of the Chinese government.[43]

In sum, *amici* stake their argument on the mutually binding obligations of international treaties. Responsible officials in this country have repeatedly expressed the concern that a failure to honor Article 36 presents grave risks to American citizens living and traveling abroad. The Founders expressed a like concern when they foresaw what has eluded the lower court: membership in the international community implies a reciprocal obligation; but if it is an obligation, it is one that redounds most to the citizens of this country.[44] We urge the Court to recognize the same obligation today.

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[39] *Flores v. State*, 994 P.2d 782, 788 (Okla. Crim. App. 1999)(Chapel, J., concurring in result); *see also id.* (court's narrow vision of the Convention "puts U.S. citizens traveling abroad at risk of being detained without notice to U.S. consular officials.").

[40] Frank Green, *Mission Chief Urges Allen to Commute Sentence*, Richmond Times-Dispatch, Sept. 17, 1997, at A1.

[41] *See US Family Detained in China*, BBC News, Mar. 21, 2001, *available at* http://news.bbc.co.uk/2/hi/asia-pacific/1233163.stm; Ann Scott Tyson, *Where's Gao? Disappeared in China: 100 days and counting*, Christian Science Monitor, June 5, 2001, *available at* http://csmonitor.com/cgi-bin/durableRedirect.pl?/durable/2001/06/05/p1s4.htm.

[42] *See id.*

[43] H.R. Res. 160, 107th Cong. (2001).

[44] *The Federalist No. 64*, at 392 (John Jay) (Clinton Rossiter ed., 2003):

> Others, though content that treaties should be made in the mode proposed, are averse to their being the SUPREME laws of the land. They insist, and profess to believe, that treaties like acts of assembly, should be repealable at pleasure. This idea seems to be new and peculiar to this country, but new errors, as well as new truths, often appear. These gentlemen would do well to reflect that a treaty is only another name for a bargain, and that

Conclusion

For the foregoing reasons, the Court should grant *certiorari* to review the judgment of the lower court.

Respectfully submitted,

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October 15, 2004

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it would be impossible to find a nation who would make any bargain with us, which should be binding on them ABSOLUTELY, but on us only so long and so far as we may think proper to be bound by it.

(26)

FILED
JAN 24 2005
OFFICE OF THE CLERK

04-5928

IN THE

Supreme Court of the United States

◆

JOSÉ ERNESTO MEDELLÍN,

Petitioner,

—v.—

DOUG DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOINT APPENDIX

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CERTIORARI GRANTED DECEMBER 10, 2004

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS (HOUSTON)

CIVIL DOCKET FOR CASE #: 4:01-cv-04078

MEDELLIN,
Petitioner

—v.—

COCKRELL,
Respondent

Petition for Writ of Habeas Corpus
(Death Penalty)
Cause: 28:2254

05/26/2004		**Record on appeal, 2 Vols - Record, 1 Vol- Suppl Record & 9 Exp Folders—State Court Records, returned from U.S. Court of Appeals, reassembled and forwarded to fileroom. CCA No. 03-20687. (bdaniel) (Entered: 05/26/2004)**
05/24/2004	**32**	**ORDER OF USCA (certified copy) 5/20/04 [31-1] appeal, Petitioner's application for certificate of appealability is DENIED, [28-1] appeal,**

		filed CCA No. 03-20687 (mharrison) (Entered: 05/25/2004)
08/28/2003		Transmitted supplemental record on appeal consisting of 1 Vol - Record (Instr. #31) to USCA: [31-1] appeal (bdaniel) (Entered: 08/28/2003)
08/13/2003		Notice of appeal and Copy of docket transmitted to USCA: [31-1] appeal (bdaniel) (Entered: 08/13/2003)
08/08/2003	31	AMENDED NOTICE OF APPEAL of [30-1] order by Jose Ernesto Medellin, filed. Fee Status: CJA (bdaniel) (Entered: 08/13/2003)
08/07/2003		Certified and transmitted record on appeal consisting of 2 Vols - Record, & 9 Exp Folders - State Court Records to U.S. Court of Appeals: [28-1] appeal. Circuit No. 03-20687 Parties ntfd. (bdaniel) (Entered: 08/07/2003)
07/28/2003	30	ORDER denying petitioner's [29-1] motion to alter judgment denying [29-2] motion to amend judgment, entered; Parties (signed by Judge John D. Rainey) (lmunoz) (Entered: 07/29/2003)
07/22/2003		NOTICE of Docketing NOA from USCA Re: [28-1] appeal USCA NUMBER: 03-20687 (mmapps) (Entered: 07/22/2003)

07/14/2003		Notice of appeal and Copy of docket transmitted to USCA: [28-1] appeal (bdaniel) (Entered: 07/14/2003)
07/11/2003	29	MOTION to alter judgment, or to amend judgment by Jose Ernesto Medellin, Motion Docket Date 7/31/03 [29-1] motion, 7/31/03 [29-2] motion, filed. (amaly) (Entered: 07/14/2003)
07/11/2003	28	NOTICE OF APPEAL of [27-1] order, [26-1] order by Jose Ernesto Medellin, filed. Fee Status: CJA (bdaniel) (Entered: 07/14/2003)
06/25/2003		Case closed (lmunoz) (Entered: 06/26/2003)
06/25/2003	27	FINAL JUDGMENT entered. This case is dismissed with prejudice; COA is DENIED, entered. Parties ntfd. (signed by Judge John D. Rainey) (lmunoz) Modified on 07/10/2003 (Entered: 06/26/2003)
06/25/2003	26	ORDER granting respondent's [16-1] motion for summary judgment; Medellin's petition is DENIED; a Certificate of Appealability is DENIED, entered; Parties notified. (signed by Judge John D. Rainey) (lmunoz) Modified on 06/26/2003 (Entered: 06/26/2003)
04/30/2003	25	ORDER granting petitioner's [23-1] motion to extend time to file response to Respondent's answer

		and motion for summary judgment; it is hereby ORDERED that petitioner's responsive pleading filed simultaneously with this motion is timely filed, entered; Parties notified. (signed by Judge D. Rainey) (lmunoz) (Entered: 05/01/2003)
04/17/2003	24	RESPONSE by Jose Ernesto Medellin to Respondent's Answer and [16-1] motion for summary judgment, filed. (psmith) (Entered: 04/17/2003)
04/17/2003	23	UNOPPOSED MOTION to extend time to file response to Respondent's answer and motion for summary judgment, by Jose Ernesto Medellin, Motion Docket Date 5/7/03 [23-1] motion, filed. (psmith) (Entered: 04/17/2003)
04/07/2003	22	ORDER granting petitioner's [21-1] motion for extension of time to file response to respondent's answer Response to motion reset 4/15/03 for [16-1] motion for summary judgment, entered; Parties notified. (signed by Judge John D. Rainey) (lmunoz) (Entered: 04/08/2003)
04/01/2003	21	UNOPPOSED MOTION for extension of time to file response to respondent's answer by Jose Ernesto Medellin, Motion Docket Date 4/21/03 [21-1] motion, filed. (kprice) (Entered: 04/02/2003)

02/21/2003	20	ORDER granting petitioner's [19-1] motion to extend time to respond to summary judgment Response to motion reset to 4/1/03 for [16-1] motion for summary judgment, entered; Parties notified. (signed by Judge John D. Rainey) (lmunoz) (Entered: 02/21/2003)
02/18/2003	19	MOTION to extend time to respond to summary judgment, by Jose Ernesto Medellin, Motion Docket Date 3/10/03 [19-1] motion, filed. (psmith) (Entered: 02/19/2003)
12/20/2002	18	ORDER granting the [17-1] motion for extension of time to file response. The answer date is set for 2/15/03 for Janie Cockrell, entered; Parties notified. (signed by Judge John D. Rainey) (psmith) (Entered: 12/20/2002)
12/03/2002	17	UNOPPOSED MOTION for extension of time to file response by Jose Ernesto Medellin, Motion Docket Date 12/23/02 [17-1] motion, filed. (kprice) (Entered: 12/03/2002)
11/15/2002	16	MOTION with brief in support for summary judgment by Janie Cockrell, Motion Docket Date 12/5/02 [16-1] motion filed (part 2 of 2) (hlerma) (Entered: 11/15/2002)
11/15/2002	16	ANSWER to Complaint by Janie Cockrell, filed. Part 1 of 2 (hlerma) (Entered: 11/15/2002)

11/04/2002	15	ORDER granting [14-1] motion to extend time to file responsive pleading to Medellin's Petition for Writ of Habeas Corpus reset answer due for 11/15/02, entered; Parties notified. (signed by Judge John D. Rainey) (lmunoz) (Entered: 11/04/2002)
09/25/2002	14	FIRST UNOPPOSED MOTION to extend time to file responsive pleading to Medellin's Petition for Writ of Habeas Corpus by Janie Cockrell, Motion Docket Date 10/15/02 [14-1] motion, filed. (hlerma) (Entered: 09/25/2002)
08/02/2002	13	ORDER that Petitioner file an answer or other responsive pleading w/in 60 days after entry of this Order; if at any time respondent files a motion for summary judgment or a motion to dismiss, Medellin is ORDERED to file a response to that motion w/in 60 days, entered; Parties notified. (signed by Judge John D. Rainey) (fmremp) (Entered: 08/05/2002)
07/18/2002	12	AMENDED PETITION for writ of habeas corpus by Jose Ernesto Medellin, amending [5-1] petition, filed. (ljackson) (Entered: 07/19/2002)
07/11/2002		STATE COURT RECORDS, received and forwarded to file room. (8 & 1 Vo. of state writ records folders) (hlerma) (Entered: 07/11/2002)

06/04/2002	11	ORDER granting respondent's [10-1] motion for Tina J Dettmer to appear pro hac vice, entered; Parties notified. (signed by Judge John D. Rainey) (lmunoz) (Entered: 06/05/2002)
04/18/2002	10	MOTION for Tina J Dettmer to appear pro hac vice by Janie Cockrell, Motion Docket Date 5/8/02 [10-1] motion, filed. (ltien) (Entered: 04/30/2002)
03/22/2002	9	ORDER petitioner's preliminary petition remains on file; preliminary petition filed pursuant to the Court's previous order shall not be adjudicated; and, a supplemental petition will be deemed to be timely filed; granting unopposed [8-1] motion for extension of time to file supplemental and/or amended petition set amended petition due for 7/20/02, entered; Parties notified. (signed by Judge John D. Rainey) (lmunoz) (Entered: 03/25/2002)
03/15/2002	8	UNOPPOSED MOTION for extension of time to file supplemental and/or amended petition by Jose Ernesto Medellin, Motion Docket Date 4/4/02 [8-1] motion, filed. (hlerma) (Entered: 03/18/2002)
01/08/2002	7	ORDER granting [6-1] agreed motion for leave to file preliminary petition for post-conviction writ of Habeas Corpus, subject to a subse-

		quent amendment and/or supplementation with leave to file a supplemental and /or amended petition on or before 4/20/02 a preliminary petition filed pursuant to this Order shall not be adjudicated by this Court until a final original petition is filed; a supplemental and/or amended petition filed in accordance with this Order will be deemed to be timely filed, and to be an original, and not a "successive," petition, entered; Parties notified. (signed by Judge John D. Rainey) (lmunoz) (Entered: 01/08/2002)
11/28/2001	6	AGREED MOTION for leave to file preliminary petition for post-conviction writ of Habeas Corpus, subject to a subsequent amendment and/or supplementation by Jose Ernesto Medellin, filed. (bchurchill) (Entered: 11/28/2001)
11/28/2001	5	Preliminary and Incomplete Prisoner Petition for Writ of Habeas Corpus; filed. (bchurchill) (Entered: 11/28/2001)
11/15/2001	4	CJA 30 as to Petitioner Jose Ernesto Medellin: Appointment of Michael B Charlton as Attorney (Signed by Judge John D. Rainey), entered. (fmremp) (Entered: 11/26/2001)
11/15/2001	3	CJA 30 as to Petitioner Jose Ernesto Medellin: Appointment of Gary

		Taylor as Attorney (Signed by Judge John D. Rainey), entered. (fmremp) Modified on 11/26/2001 (Entered: 11/26/2001)
11/15/2001	2	ORDER granting [1-1] motion for appointment of counsel (Michael B. Charlton for Gary Taylor), entered; Parties notified. (signed by Judge John D. Rainey) (sguevara) (Entered: 11/19/2001)
10/09/2001	1	MOTION for appointment of counsel by Jose Ernesto Medellin, Motion Docket Date 10/29/01 [1-1] motion, filed. (bchurchill) (Entered: 10/31/2001)

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

JOSE ERNESTO MEDELLIN,

Petitioner-Appellant

—v.—

DOUG DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent-Appellee

Docket #: 03-20851

GENERAL DOCKET

8/29/03	Death penalty case docketed. NOA filed by Appellant Jose Ernesto Medellin in 03-20851. [03-20851] (jbr) [03-20851]
8/29/03	Additional Appeal docketed. [03-20687, 03-20851] (jbr) [03-20687 03-20851]
9/2/03	Confirmation letter filed by Appellant Jose Ernesto Medellin in 03-20687 confirming an extension of time to and including 10/22/03 for filing motion for COA w/brief. [03-20687] Motion due ddl updated to 10/22/03 for Jose Ernesto Medellin. Brief in Support ddl updated to 10/22/03 for Jose Ernesto Medellin. (mrw) [03-20687]
9/4/03	Supplemental record on appeal filed. Supplement #: 1 Vol(s) of Pleadings: 1 [03-20687, 03-20851] (mrw) [03-20687 03-20851]
10/24/03	Motion filed by Appellant Jose Ernesto Medellin in 03-20687, Appellant Jose Ernesto Medellin in 03-20851 for certificate of appealability [4648412-1] Motion due ddl satisfied. Date of COS: 10/22/03 Sufficient [Y/N]: Y [03-20687, 03-20851] (mrw) [03-20687 03-20851]
10/24/03	Brief filed in support of motion for Certificate of Appealability [4648412-1] by Appellant Jose Ernesto Medellin Brief in Support ddl satisfied. in 03-20687, Brief in support of motion for Certificate of Appealability [4648412-1] by Appellant Jose Ernesto Medellin in 03-20851 [4648414-1] [03-20687, 03-20851] (mrw) [03-20687 03-20851]
10/29/03	Criminal Justice Act 30 received from Michael B Charlton for Appellant Jose Ernesto Medellin in 03-20687 Timely: y/interim payment #1. [03-20687] (cgp) [03-20687]
11/6/03	Criminal Justice Act 30 received from Gary Allen Taylor for Appellant Jose

	Ernesto Medellin in 03-20687 Timely: y/interim payment #1. [03-20687] (cgp) [03-20687]
11/26/03	Response/opposition filed by Appellee Doug Dretke in 03-20687, in 03-20851 to motion for Certificate of Appealability [4648412-1] by Appellant Jose Ernesto Medellin in 03-20687, motion for Certificate of Appealability [4648412-1] by Appellant Jose Ernesto Medellin. Response/Opposition ddl satisfied. Date of COS 11/24/03. [4679278-1] [03-20687, 03-20851] (jbr) [03-20687 03-20851]
5/20/04	Opinion order filed denying appellant's motion for Certificate of Appealability [4648412-1] in 03-20851, 03-20851 Issd in T form? y Judge Initials: EHJ FPB EBC (ISSUED AS AND FOR THE MANDATE) [03-20687, 03-20851] (jma) [03-20687 03-20851]
5/20/04	Mandate issued. Approved BOC Issued (Y/N)?: n [03-20687, 03-20851] (jma) [03-20687 03-20851]
5/24/04	Record on appeal returned to 5CCA. Volumes: 2 Supplemental Volumes: 1 Exhibits: 2 Boxes SCP [03-20687, 03-20851] Case Management ddl satisfied. (mrw) [03-20687 03-20851]
5/24/04	Record on appeal returned to USDC. Volumes: 2 Supplemental Volumes: 1 Exhibits: 2 Boxes SCP. [03-20687, 03-20851] (mrw) [03-20687 03-20851]

8/24/04	Supreme Court notice that petition for certiorari was filed on 08/18/04 by Appellant Jose Ernesto Medellin in 03-20687, Appellant Jose Ernesto Medellin in 03-20851. Supct No.: 04-5928 [03-20687, 03-20851] (cav) [03-20687 03-20851]

STATEMENT OF PERSON IN CUSTODY

Tuesday, June 29, 1993 Time: 554 Hrs.

Statement of **Jose Ernesto Medellin** taken in Harris County, Texas.

Prior to making this statement I was warned by Sgt. L.W. Hoffmaster of the Houston Police Homicide Division, the person to whom this statement was made, that:

1.) JEM I have the right to remain silent and not make any statement at all and any statement I make may and probably will be used against me at my trial;
Response: **yes sir**.

2.) JEM Any statement I make may be used as evidence against me in court; Response: **yes**.

3.) JEM I have the right to have a lawyer present to advise me prior to and during any questioning;
Response: **yes sir**.

4.) JEM If I am unable to employ a lawyer, I have the right to have a lawyer appointed to advise me prior to and during any questioning and;
Response: **yes sir**.

5.) JEM I have the right to terminate, or stop, this interview at any time.
Response: **yes sir**.

6.) JEM Prior to and during the making of this statement I knowingly, intelligently and voluntarily waived, or gave up, the rights set out above and made the following voluntary statement:
Response: **yes sir**. JEM

My name is Jose Ernesto Medellin. I am 18 years old years old. I was born in Laredo Mexico on 3/4/75. I last went to school at Eisenhower High School and have a total of 8 years of formal education.

On thursday June 24th,1993, around 8:30 or 9:00PM in the evening, I went to the Brook Green apartments with Raual (doesn't know last name), Peter Cantu, my little brother Venancio Medellin Jr., Efrain Perez, Frank Sandaval and his brother Roman Sandaval. Another friend Sean Derrick Obrien, lives in the Brook Green Apartments. I went to Sean's Apartment and told him that we were going to initiate Raual into our gang. Sean and I went to the parkinglot to go meet the others. Then we went to the railroad tracks behind the Brook Green Apartments and crossed over to the grass area on the banks of the bayou. Peter told Sean to take him, meaning to fight Raual, Raual's initiation was going to be to fight all of us. Sean said no I can't see, it's too dark. Sean has vision problems.

JOSE E. MEDELLIN
Signature

Witnesses:

SGT. G. J. NOVAK 6-29-93 7:23 AM
M. E. DOYLE 6-29-93 7:23 AM

Page 2 of Custodial Statement of Jose Ernesto Medellin.

Me and Peter were talking to Sean about it. We called Roman Sandoval to where we were and told Roman to take him. Roman said no man he's a little bit to big for me. Then we told Roman that if we were to get into a fight out on the street he wouldn't be able to say that. Roman said fuck it, I'll take him. Roman went up to Raual and started fighting with him. They stopped fighting and Sean said fuck it, I'll whip his ass to. Then Sean started fighting with Raual. They stopped fighting and Peter said I'll take him. I told Peter no you are the leader I'll take him. I fought Raual and then we stopped. Then Peter said you take him Junior, meaning Efrain Perez and they started fighting. When they stopped Peter told Raual that if he could stand up for more than ten seconds, he was in. Then we went back to the tracks in the middle of the railroad bridge and we were drinking up there. We were talking and drinking and we said fuck it lets find something else for him to do.

We were walking back to the parking lot and as we were walking down the tracks a girl passed by us. When Peter saw the second girl, he said kick his ass Junior to Efrain Perez. Peter thought the hispanic girl was a boy. We started talking to the two girls, they told us their names were Jenifer and Elizabeth and that they had to go home.

Peter grabbed Jenifer and said bitch your going to come over here. Peter told Raual to grab the other one. The were saying let us go please and Peter said bitch were going to fuck your ass. Elizabeth said don't hurt me I'll let you do it. I was with Peter and Elizabeth and Sean, Raual and Efrain were with Jenifer. Peter was having sex with Elizabeth, then Peter ask her for her phone number and she gave him a number, 686-3267. Then Peter ask her why don't you suck my friends dick, meaning me, and she said yes. Then she did it. Elizabeth told me to hurray up that she had to go home. She ask Peter you're going to let us go right and he said yes.

While this was going on Raual, Sean and Efrain were taking turns having sex with Jenifer.

Then Peter called Raual and me over to where he was. Peter told my little brother to get all their stuff, beepers, watch, rings and necklaces. Then we took them to the woods and Efrain began having sex with Elizabeth in the woods and Sean with Jenifer. Then Peter told Raual to kill Jenifer, Sean handed Raual a belt and said do it with this. Raual strangled Jenifer with the belt. The belt tore and Jenifer fell to the ground and Peter told Raual to use his foot, to put his foot on her throat and step on it. Then Raual did that. Peter told Efrain to do the same thing to Elizabeth but to use his shoe lace. Efrain couldn't get a good grip so he told me to hold one end of the shoe lace. Then Efrain got a better grip on the shoe lace and took it

Jose E. Medellin
Signature

Witnesses:

Sgt. G. J. Novak 6-29-93 7:23 AM
M. E. Doyle 6-29-93 7:23 AM

Page 3 of Custodial Statement of Jose Ernesto Medellin.

back and continued to choke Elizabeth. Efrain let go and she was still moving and Peter told him to step on her throat and Efrain did that.

As all of this was going on, my little brother walked by and Peter told me to tell him to leave, so that he wouldn't see it but they had already started killing the girls.

As we were leaving Raual said I don't think this bitch is dead, he was talking about Jenifer. Raual started stomping on Jenifer's face with his foot. Then he started doing the same thing to Elizabeth. Then we left.

Raual kept some of the jewelry and I threw one of the beepers in the bayou and Peter threw the other beeper in the bayou. Then we went home. The Mickey Mouse Watch that my little brother Venancio had belonged to one of the girls, I don't know which one.

I have read this, my statement, consisting of 3 page/pages, and finished reading it at 7:23 Hrs.

JOSE E. MEDELLIN
Signature

Witnesses:

SGT. G. J. NOVAK Pr# 39034 Date: 6-29-93

M. E. DOYLE Pr# 40900 Time: 07:23 Hrs.

End of statement of Jose Ernesto Medellin.

NO. 675430 339TH DISTRICT COURT

THE STATE OF TEXAS

VS

JOSE ERNESTO MEDELLIN

VOLUME I

TRANSCRIPT

CCA

TRANSCRIPT

CAUSE NO. 675430

71997

In the 339th District Court of Harris County, Texas,
Honorable Caprice Cosper, Judge Presiding.

JOSE ERNESTO MEDELLIN, Appellant

vs

THE STATE OF TEXAS

Appealed to the Court of Criminal Appeals of Texas, at Austin, Texas.

Appellant Attorney
for Appellant
RANDY McDONALD
ATTORNEY OF RECORD
1301 McKINNEY,
SUITE 3100
HOUSTON, TEXAS 77010

Appellant Attorney
for State
Mr. Calvin Hartman
Assistant District
Attorney
201 Fannin
Houston, Texas 77002

Delivered to Court of Criminal Appeals of Texas, at Austin, Texas on the 5th day of December 1994.

KATHERINE TYRA
District Clerk
Harris County, Texas

By: [ILLEGIBLE]
Deputy

(Court of Criminal Appeals) Cause No.__________

Filed in the Court of Criminal Appeals of Texas, at Austin, Texas this ___ day of ___, 19___.

FILED IN
COURT OF CRIMINAL
APPEALS, Clerk
DEC 12 1994

By: Thomas Lowe, Clerk
Deputy

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IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF TEXAS

JOSE ERNESTO MEDELLIN
APPELLANT,
VS.
THE STATE OF TEXAS,
APPELLEE.

CAUSE NO. 675430
APPEAL FROM 339TH DISTRICT COURT
HARRIS COUNTY, TEXAS
Judge Caprice Cosper Presiding

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Leisa Hudson
Deputy Official Court Reporter
339th District Court
Harris County, Texas

CAUSE NO. 675430

THE STATE OF TEXAS VS. JOSE ERNESTO MEDELLIN	IN THE 339TH DISTRICT COURT OF HARRIS COUNTY, TEXAS

APPEARANCES:

For the State:	Mr. Mark Vinson Mr. Terry Wilson Assistant District Attorneys Harris County, Texas
For the Defendant:	Mr. Jack Millin Ms. Linda Mazzagatti Attorneys at Law Houston, Texas

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125	Photo	--	868	866	866	32
126	Photo	--	869	866	866	32
127	Photo	--	869	866	866	32
128	Photo	--	865	866	866	32
129	Photo	--	--	--	--	--
130	Photo	--	872	866	866	32
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132	Photo	--	865	866	866	32
133	Photo	--	875	866	866	32
134	Photo	--	--	--	--	--
135	Photo	--	875	866	866	32
136	Photo	--	875	866	866	32
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⑦

No. 04-5928

IN THE

Supreme Court of the United States

JOSÉ ERNESTO MEDELLÍN,

Petitioner,

—v.—

DOUG DRETKE, DIRECTOR, TEXAS DEPARTMENT OF
CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER

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PETITION FOR CERTIORARI FILED AUGUST 18, 2004
CERTIORARI GRANTED DECEMBER 10, 2004

QUESTIONS PRESENTED

CAPITAL CASE

1. In a case brought by a Mexican national whose rights were adjudicated by the International Court of Justice in *Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 1 (Mar. 31), must a court in the United States apply as the rule of decision the holding in *Avena* that the United States courts must review and reconsider the national's conviction and sentence taking account of the violation of his rights under the Vienna Convention on Consular Relations, *opened for signature* Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261, without resort to procedural default doctrines?
2. In the alternative, in a case brought by a foreign national of a State party to the Vienna Convention, should a court in the United States give effect to the judgments in *Avena* and *LaGrand (F.R.G. v. U.S.)*, 2001 I.C.J. 466 (June 27), in the interest of judicial comity and uniform treaty interpretation?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 371 F.3d 270 and reproduced in the Appendix to the Petition ("P.A.") at 119a-135a. Earlier opinions in this proceeding, which are not published, are reproduced at P.A. 1a-135a.

JURISDICTION

The Court of Appeals entered judgment on May 20, 2004. Petitioner filed his petition for certiorari on August 18, 2004, within 90 days after the entry of judgment by the Court of Appeals. This Court granted certiorari on December 10, 2004. The Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, TREATY, AND STATUTORY PROVISIONS INVOLVED

This case involves the following provisions: (1) the United States Constitution, art. II, § 2, cl. 2; art. III, § 2, cl. 1; art. VI, cl. 2 (P.A. 136a-137a); (2) the Vienna Convention on Consular Relations, *opened for signature* April 24, 1963, art. 36, 21 U.S.T. 77, 596 U.N.T.S. 261 ("Vienna Convention") (P.A. 137a-138a); (3) the Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, *opened for signature* April 24, 1963, art. I, 21 U.S.T. 325, 596 U.N.T.S. 487 ("Optional Protocol") (P.A. 138a); and (4) the United Nations Charter, United Nations Charter, *opened for signature* June 26, art. 94(1) 1945, 59 Stat. 1031, and Statute of the International Court of Justice, arts. 36(1), 59, *opened for signature* June 26, 1945, 59 Stat. 1031 ("ICJ Statute") (P.A. 139a-141a).

STATEMENT OF THE CASE

In this case, petitioner José Ernesto Medellín Rojas seeks enforcement of his right, under the Vienna Convention on

Consular Relations, and the judgment of the International Court of Justice ("ICJ") in *Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 1 (Mar. 31) ("*Avena* Judgment") (P.A. 174a-274a), to review and reconsideration of his conviction and death sentence without regard to the procedural default rules imposed by Texas law. The ICJ entered the *Avena* Judgment pursuant to its jurisdiction under the Optional Protocol, art. I (P.A. 138a).

A. The Vienna Convention and Its Optional Protocol.

1. The Treaties.

The Vienna Convention on Consular Relations "is widely accepted as the standard of international practice of civilized nations, whether or not they are parties to the Convention." U.S. Dep't of State, Telegram 40298 to the U.S. Embassy in Damascus (Feb. 21, 1975), *reprinted in* LUKE T. LEE, CONSULAR LAW AND PRACTICE 145 (2d ed. 1991).

Article 36 of the Vienna Convention establishes an interrelated regime of rights that enables consular officers to protect nationals who are detained in foreign countries. *See* Vienna Convention, art. 36 (P.A. 137a-138a). Article 36(1)(b) requires the authorities of the detaining state to notify "without delay" a detained foreign national of his right to request assistance from the consul of his own state and, if the national so requests, to inform the consular post of that national's arrest or detention, also "without delay." Article 36(1)(a) and (c) require the detaining country to permit the consular officers to render various forms of assistance, including arranging for legal representation. Finally, Article 36(2) requires that a country's "laws and regulations . . . enable full effect to be given to the purposes for which the rights accorded under this Article are intended."

The Optional Protocol provides that disputes "arising out of the interpretation or application of the [Vienna] Convention shall lie within the compulsory jurisdiction of the International Court of Justice." Optional Protocol, art. I (P.A. 138a). The jurisdiction of the ICJ depends entirely on the consent of the States that are party to the dispute. Parties may consent to the general jurisdiction of the ICJ on questions of treaty interpretation or international law, *see* ICJ Statute, or they may enter into treaties conferring jurisdiction on the ICJ over specific matters, *id.*, art. 36(1). The Optional Protocol falls in the latter category.

The United States played a leading role at the 1963 diplomatic conference that produced the Vienna Convention and its Optional Protocol. *See Report of the United States Delegation to the United Nations Conference on Consular Relations, reprinted in* VIENNA CONVENTION ON CONSULAR RELATIONS AND OPTIONAL PROTOCOL, S. EXEC. DOC. E, 91-9, at 59-61 (1969) ("*Report of the United States Delegation*"). The United States proposed the binding dispute-settlement provision that became the Optional Protocol, arguing that "the codification of international law and the formulation of measures to ensure compliance with its provisions should go hand in hand" and that binding dispute resolution is "one of the most important points connected with the convention on consular relations." *Summary Records of Plenary Meetings and of the Meetings of the First and Second Committees*, U.N. Conference on Consular Relations, 1st Sess., 29th mtg., at 249, U.N. Doc. A/CONF.25/16 (1963).

2. United States Ratification.

The United States signed the Vienna Convention and its Optional Protocol on April 24, 1963, and President Nixon sent it to the Senate for its advice and consent on May 8, 1969. The United States delegation's report to the Senate addressed the importance of the reciprocal obligation to inform a detained foreign national of his right to seek consular assistance under Article 36(1)(b) of the Vienna Convention:

> This provision has the virtue of setting out a requirement which is not beyond means of practical implementation in the United States, and, at the same time, is useful to the consular service of the United States in the protection of our citizens abroad.

Report of the United States Delegation, *supra*, at 60.

On October 22, 1969, the Senate unanimously gave its advice and consent, *see* 115 CONG. REC. 30,997 (Oct. 22, 1969), and on December 24, 1969, President Nixon ratified the Vienna Convention and Optional Protocol. *See* 21 U.S.T. 77, 185.

3. Current Status.

To date, 166 states have ratified the Vienna Convention,[1] making it one of the most widely ratified multilateral treaties in force. The United States has described the rights and obligations set forth in Article 36 as "of the highest order," in large part because of the reciprocal nature of the obligations and hence the importance of these rights to United States consular officers seeking to protect United States citizens abroad. ARTHUR W. ROVINE, U.S. DEP'T OF STATE, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 1973, at 161 (1973).

Forty-six states have ratified the Optional Protocol.[2] The United States was the first party to invoke the Optional Protocol when it sued Iran in 1979 on claims, among others, of breach of the Vienna Convention. *See United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)*, 1980 I.C.J. 3 (May 24).

B. The Decisions of the Texas Courts.

On June 29, 1993, law enforcement authorities arrested Mr. Medellín, 18 years old at the time, in connection with two murders in Houston, Texas. Mr. Medellín, a Mexican national, told the arresting officers that he was born in Laredo, Mexico, and informed Harris County Pretrial Services that he was not a United States citizen. Joint Appendix ("J.A.") 15; P.A. 165a. It is uncontested that, nevertheless, Mr. Medellín was not advised of his right under Article 36 of the Vienna Convention to contact the Mexican consul. P.A. 243a-244a, ¶ 106(1) (*Avena* Judgment).

The United States recognizes that the consular assistance Mexico provides its nationals in capital cases is "extraordinary." Counter-Memorial of the United States of America at 186, *Avena* Case (No. 128) ("Counter-Memorial"); *see also* Memorial of Mexico at 11-38, *Avena* Case (No. 128) ("Memorial").[3] At the time Mr. Medellín was arrested and tried, Mexican consular officers routinely assisted capital defendants by providing funding for experts and investigators, gathering mitigating evidence, acting as a liaison with Spanish-speaking family members, and, most importantly, ensuring that Mexican nationals were represented by competent and experienced defense counsel.[4] As a result of the Article 36 violation in his case, however, Mr. Medellín had no opportunity to receive the assistance of Mexican consular officers either before or during his trial.

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[1] *See* Multilateral Treaties Deposited with the Secretary-General: Vienna Convention on Consular Relations, *at* http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIII/treaty31.asp (last visited Jan. 18, 2005).

[2] *See* Multilateral Treaties Deposited with the Secretary-General: Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, *at* http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIII/treaty33.asp (last visited Jan. 18, 2005).

[3] The parties' written and oral pleadings and the judgment, orders and press releases of the ICJ in the *Avena* case are available at http://www.icj-cij.org/idocket/imus/imusframe.htm. Judgments and orders of the ICJ are available both on Westlaw and on the ICJ's website at http://www.icj-cij.org/icjwww/idocket/imus/imusframe.htm.

The Texas trial court appointed counsel to represent Mr. Medellín, who was indigent. On September 16, 1994, Mr. Medellín was convicted of capital murder and, upon the jury's recommendation, the trial court sentenced Mr. Medellín to death on October 11, 1994. *State v. Medellin*, Judgment, No. 675430 (Tex. 339th Dist. Ct., Oct. 11, 1994).[5] On March 16, 1997, the Texas Court of Criminal Appeals affirmed Mr. Medellín's conviction and sentence in an unpublished opinion. *Ex parte Medellin*, Order, No. 50191-01 (Tex. Crim. App. Mar. 16, 1997) (P.A. 1a-2a).

On April 29, 1997, some six weeks after the affirmance of his death sentence on direct appeal, Mexican consular authorities first learned of Mr. Medellín's arrest, detention, trial, conviction, and sentence. *See* Memorial App. A, ¶ 235. They promptly began rendering assistance. *See id.*

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[4] *See* Memorial at 11-38; *Valdez v. State*, 46 P.3d 703, 710 (Okla. Crim. App. 2002) (finding Mexico would have provided critical resources in 1989 capital murder trial of Mexican national).

[5] During the course of the preparation for Mr. Medellín's trial, lead counsel was suspended from the practice of law for ethics violations in another case. *See* Memorial App. A, ¶ 232. During jury selection, he failed to strike jurors who indicated they would automatically impose the death penalty. *See, e.g.*, 15 Statement of Facts ("S.F.") 112-13; 16 S.F. 205, 286. During the guilt phase of trial, counsel called no witnesses. At the penalty phase, he presented only one expert witness (a psychologist who had never met Mr. Medellín) and Mr. Medellín's parents testified only briefly. 35 S.F. 279-92, 294-349. The entire penalty phase defense lasted less than two hours. Transcript ("Tr.") at 343-441 (Trial Docket at 000281).

On March 26, 1998, Mr. Medellín filed a state application for habeas corpus, alleging the violation of his rights under Article 36 of the Vienna Convention and requesting, among other relief, an evidentiary hearing and vacatur of his conviction and sentence. Application for Writ of Habeas Corpus at 25-31, 45, *Medellin v. State*, No. 675430-A (Tex. 339th Dist. Ct. Mar. 26, 1998). The state did not contest that Mr. Medellín was a citizen of Mexico or that state officials had failed to advise Mr. Medellín of his right under Article 36 of the Vienna Convention to contact the Mexican consulate. *See* P.A. 46a-47a.

On January 22, 2001, adopting verbatim the state's proposed findings and conclusions, the state trial court recommended denial of relief. P.A. 34a-58a. It held that the Texas contemporaneous-objection rule barred the Vienna Convention claim because Mr. Medellín had not raised the claim at trial and that he had no individual right to raise the Article 36 violation. P.A. 55a-56a, ¶¶ 13, 15.[6] The court also denied Mr. Medellín's request for an evidentiary hearing. P.A. 57a. On October 3, 2001, by an unpublished order, the Texas Court of Criminal Appeals adopted the trial court's findings and conclusions, providing no reasoning except to state that they were "supported by the record." P.A. 32a-33a.

C. The Decision of the District Court.

On November 28, 2001, Mr. Medellín filed a petition for a writ of habeas corpus, and on July 18, 2002, an amended petition, in the United States District Court for the Southern

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[6] While not questioning Mr. Medellín's Mexican citizenship, the state's proposed findings adopted by the state court also stated in the alternative that Mr. Medellín "fail[ed] to show foreign nationality which requires notification of a foreign consulate" and could not show that the violation affected the constitutional validity of his conviction and sentence. P.A. 46a-47a, ¶¶47-50, 56a, ¶ 14; *see id.* at 56a-57a, ¶¶ 16-17.

District of Texas. Mr. Medellín raised a claim under Article 36 of the Vienna Convention, again requesting an evidentiary hearing and vacatur of his conviction and sentence. *See* Amended Petition for Writ of Habeas Corpus at 46, *Medellin v. Cockrell*, Civ. No. H-01-4078 (S.D. Tex. July 18, 2002).

In support of his petition, Mr. Medellín relied on *LaGrand (F.R.G. v. U.S.)*, 2001 I.C.J. 466 (June 27), in which the ICJ had recently held that Article 36(1) of the Vienna Convention creates individual rights to consular notification and that Article 36(2) of the Convention prevents the application of procedural default rules to bar the challenge to a conviction or sentence on the ground of the Article 36(1) breach. Among other things, Mr. Medellín argued that "*LaGrand* . . . controls the interpretation of the Vienna Convention" and that the District Court was bound by *LaGrand*'s rulings regarding individual rights and procedural default. *See* Petitioner's Response to Respondent's Answer and Motion for Summary Judgment, at 14-17, *Medellin v. Cockrell*, Civ. No. H-01-4078 (S.D. Tex. Apr. 17, 2003).

On June 26, 2003, the District Court denied relief and a certificate of appealability. P.A. 59a-118a. The District Court held that (1) Mr. Medellín had defaulted his Vienna Convention claim under the "adequate and independent state procedural rule" applied by the Texas state courts, and (2) the Vienna Convention did not create individually enforceable rights and, hence, no judicial remedy is available for its violation. P.A. 82a, 84a-85a & n.17.[7] The District Court

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[7] The District Court held in the alternative that, if the Vienna Convention created individual rights, Mr. Medellín was barred from asserting them by the nonretroactivity principle of *Teague v. Lane*, 489 U.S. 288 (1989), and that he could not demonstrate that the violation affected the constitutional validity of his conviction and sentence. P.A. 83a-85a.

rejected Mr. Medellín's argument that *LaGrand* was controlling, explaining that it was "simply wary of finding that the ICJ overruled entrenched Supreme Court precedent" on the application of state procedural rules to bar consideration of Vienna Convention claims. P.A. 82a.

D. The *Avena* Judgment.

On January 9, 2003, while Mr. Medellín's habeas petition was pending before the District Court, the Government of Mexico initiated proceedings in the ICJ against the United States, alleging violations of the Vienna Convention in the cases of Mr. Medellín and 53 other Mexican nationals who had been sentenced to death in state criminal proceedings in the United States. *See* Mexico's Application Instituting Proceedings, *Avena* Judgment (No. 128). Seeking relief on its own behalf and, in the exercise of its right of diplomatic protection, of its nationals, Mexico claimed that the United States had violated Article 36 in each of those cases and requested, among other relief, the annulment of the convictions and sentences of the 54 Mexican nationals and a declaration that procedural default bars may be not be applied to prevent redress of Vienna Convention violations. P.A. 188a-190a, ¶ 12.

On June 20, 2003, Mexico filed a 177-page Memorial and 1300-page Annex of written testimony and documentary evidence in support of its claims. On November 3, 2003, the United States filed a 219-page Counter-Memorial and 2500-page Annex of written testimony and documentary evidence in rebuttal. Both parties' submissions addressed the factual predicates for the alleged violations in each of the nationals' cases, including the course of the relevant proceedings to date in the United States courts, and argued all relevant points of law. Memorial at A-50 to -134; Counter-Memorial at A-75 to -358. In Mr. Medellín's case, the parties' submissions included descriptions of his proceedings through the District

Court's denial of his petition for habeas corpus. *See* Memorial at A-103, A-1192 to -1212 (describing and appending Texas trial court's findings of fact and conclusions of law); Counter-Memorial at A-223 (citing and describing District Court's holdings and alternative holdings).

During the week of December 15, 2003, the ICJ held a hearing, P.A. 187a, ¶ 11,[8] and, on March 31, 2004, issued a final judgment, P.A. 174a-274a. The *Avena* Judgment built on ICJ's earlier holdings in *LaGrand*, which Germany had brought on the basis of the Optional Protocol, and in which the United States had also fully participated. However, in *Avena*, unlike *LaGrand*, the applicant State was able to seek relief on the merits for nationals who had not yet been executed. As a result, in *Avena*, the ICJ expressly adjudicated Mr. Medellín's own rights, as well as those of the other nationals on whose behalf Mexico had sought relief, and entered a final judgment. P.A. 214-215a, 243a-245a, ¶¶ 40, 106.

Addressing liability, the ICJ first held that, in the cases of 51 of the Mexican nationals, the United States had breached its obligation under Article 36(1)(b) "to inform detained Mexican nationals of their rights under that paragraph" and in 49 of those cases "to notify the Mexican consular post of the[ir] detention." P.A. 243a-244a, 271a-272a, ¶¶ 106(1)-(2), 153(4)-(5).[9] In 49 of those cases, the ICJ also held that the United States had breached its obligation under Article 36(1)(a) "to enable Mexican consular officers to communicate with and have access to their nationals, as well as its obligation under paragraph 1(c) of that Article regarding the right of consular officers to visit their detained nationals." P.A. 244a, 272a, ¶¶ 106(3), 153(6). And in 34 of those cases, the ICJ also held that the United States had breached its obligation under Article 36(1)(c) "to enable Mexican consular officers to arrange for legal representation of their nationals." P.A. 244a-245a, 272a, ¶¶ 106(4), 153(7). Mr. Medellín was expressly included in each of those holdings of breach.

The ICJ then turned to remedies, or "what remedies are required in order to redress the injury done to Mexico and to its nationals by the United States" by violation of Article 36. P.A. 256a, ¶ 128; *see* P.A. 250a-268a, ¶¶ 115-150. The ICJ rejected Mexico's request for annulment of the convictions and sentences. P.A. 254a, ¶ 123. Instead, in response to Mexico's request for alternative relief, the ICJ held that as a remedy for the violations of Article 36(1), the United States must provide "review and reconsideration" of the convictions and sentences of Mr. Medellín and the other Mexican nationals in whose cases it found violations. P.A. 195a, 253a, 274a, ¶¶ 14, 121-122, 153(9).

The ICJ then specified the nature of the review and reconsideration that would need to be provided to Mr.

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[8] At the hearing, argument was presented on behalf of the United States: from the State Department, the Legal Adviser, the Principal Deputy Legal Adviser, the Assistant Legal Adviser for Consular Affairs, and the Assistant Legal Adviser for United Nations Affairs; from the Justice Department, by an Associate Deputy Attorney General; and distinguished professors of international law and comparative criminal procedure. P.A. 181a-183a, 188a. The Principal Deputy Chief of the Criminal Appellate Section and the Deputy Assistant Attorney General, Office of Legal Counsel, of the Department of Justice, also participated as members of the United States delegation. P.A. 181a-183a.

[9] Because Mexico withdrew its claims in the cases of two of the nationals initially included in its application, the ICJ adjudicated the claims of 52 Mexican nationals. P.A. 186a, ¶ 7. The ICJ denied Mexico's application to amend its claim to include two additional Mexican nationals, upholding an objection by the United States that the late amendment would deprive the United States of an adequate opportunity to defend. P.A. 185a-186a, ¶ 7.

Medellín. The ICJ explained that, *first*, the required review and reconsideration must take place "within the overall judicial proceedings relating to the individual defendant concerned;" *second*, that procedural default doctrines could not bar the required review and reconsideration when the competent authorities of the detaining State had themselves failed in their obligation of notification; *third*, the review and reconsideration must take account of the Article 36 violation on its own terms and not require that it qualify also as a violation of some other procedural or constitutional right; and *finally*, the forum in which the review and reconsideration occurs must be capable of "examin[ing] the facts, and in particular the prejudice and its causes, taking account of the violation of the rights set forth in the Convention." P.A. 247a-249a, 252a-253a, 258a-259a, 261a-262a, ¶¶ 111-113, 120-122, 133-134, 138-141. In concluding, the ICJ emphasized that the review and reconsideration it had granted as a remedy to Mr. Medellín and the other nationals was one of additional process, not prescribed result:

> what is crucial in the review and reconsideration process is the existence of a procedure which guarantees that full weight is given to the violation of the rights set forth in the Vienna Convention, whatever may be the actual outcome of such review and reconsideration.

P.A. 262a, ¶ 139.

The ICJ reached each of its holdings on liability by a vote of fourteen to one and its holding on remedies unanimously. P.A. 271a-274a, ¶ 153(4)-(7), (9), (11). Both the United States judge and the Mexican judge voted with the majority on each of these holdings. *Id.*

E. The Decision of the Court of Appeals.

On October 24, 2003, while *Avena* was pending before the ICJ, Mr. Medellín sought a certificate of appealability from the Court of Appeals on several grounds, including his Vienna Convention claim. J.A. 11. On May 20, 2004, after the ICJ had rendered its judgment, the Court of Appeals denied Mr. Medellín's application. P.A. 135a.

In its discussion of the Vienna Convention claim, the Court of Appeals recognized that Mr. Medellín was among the Mexican nationals whose claims had been adjudicated in the *Avena* Judgment. P.A. 131a-132a. It also recognized that the ICJ had held in *LaGrand* and reiterated in *Avena* that, *first*, "procedural default rules cannot bar review of a petitioner's claim," and *second*, Article 36 conferred individually enforceable rights. P.A. 131a-133a. It held, however, that the first holding "contradict[ed]" this Court's per curiam order in *Breard v. Greene*, 523 U.S. 371 (1998), and that the second holding contradicted the holding of a prior Fifth Circuit panel in *United States v. Jimenez-Nava*, 243 F.3d 192 (5th Cir. 2001). P.A. 132a-133a. It held, therefore, that it was bound to disregard *LaGrand* and *Avena* unless and until this Court or, in the case of the individual right holding, the Court of Appeals en banc, decided otherwise. P.A. 131a-133a. The Court of Appeals did not otherwise address the individual right or procedural default issues or consider any other aspect of the Vienna Convention claim.

Mr. Medellín filed a timely petition for a writ of certiorari, which this Court granted.

SUMMARY OF ARGUMENT

This case is about the willingness of the United States to keep its word. This Court must ensure that the courts of the State of Texas and other state and federal courts throughout the land comply with the legally binding international commitments that, by the constitutionally prescribed processes, the United States has made.

I. Rights created by treaty are binding and judicially enforceable as a matter of United States law. Under international law, a nation's treaty obligations are binding on all of the branches of government, including the judiciary; and where the nation is organized as a federation, as is the United States, its treaty obligations are binding on all of its constituent states. To ensure the nation's ability to comply with its international obligations, the United States Constitution gives treatymaking power to the President and Senate exclusive of the states; it gives treaty-enforcing power to the federal judiciary; it provides that judges are bound to enforce the treaties that the President and Senate have made; and it provides that treaties, like federal statutes and the Constitution itself, are the "supreme Law of the Land" and preempt inconsistent state law.

Whenever a treaty creates rules of law that are susceptible to judicial enforcement without implementing legislation—in other words, whenever a treaty is self-executing—the Supremacy Clause requires the courts to enforce it. Thus, this Court has routinely enforced treaties providing rights to foreign nationals in this country, including treaties that limit criminal prosecutions of foreign nationals. Indeed, by its terms, the habeas corpus statute provides a federal judicial remedy to individuals who are in custody in violation of a treaty.

As relevant here, the United States bound itself by treaties to give effect to Mr. Medellín's rights under the *Avena* Judgment. *First*, by acceding to the Vienna Convention on Consular Relations, the United States committed itself to inform nationals of its treaty partners who are arrested or otherwise detained in the United States of their right to contact and seek assistance from their consulates. It also committed itself to follow procedures that are adequate to give full effect to the purposes for which those rights were created. *Second*, by the Optional Protocol to the Vienna Convention, the United States committed itself to submit disputes arising from the interpretation or application of that Convention to binding adjudication by the ICJ, in cases brought by other parties to the Optional Protocol. *Third*, by the Optional Protocol as well as the United Nations Charter and the Statute of the ICJ, the United States committed itself to abide by ICJ judgments to which it is a party.

Those treaty obligations require the United States to enforce the *Avena* Judgment in this case. A nation's consent to the jurisdiction of the ICJ constitutes a binding agreement to abide by the result. That is clear not only from this Court's precedents, from international law, and from the consistent position of the Executive Branch, but also from the terms of the treaties.

The rights interpreted and applied in the *Avena* Judgment, which arise under the Vienna Convention, are unquestionably self-executing and hence judicially enforceable in any case in which they are at issue. At the time of ratification, the Executive Branch declared that the Vienna Convention was wholly self-executing and that no implementing legislation was required. It continues to espouse that position today. Furthermore, by their terms, the relevant provisions of the Vienna Convention call for action by law enforcement officials and by the courts, not for the enactment of legislation by Congress.

As a binding interpretation and application of a self-executing treaty obligation, the *Avena* Judgment must itself be judicially enforceable. Any other result would contravene the agreement of the United States, in the Optional Protocol, that disputes as to the meaning and application of the provisions of the Convention be resolved by ICJ adjudication. Moreover, as the *Avena* Judgment makes clear, the relevant treaty rights can receive effective enforcement only through the judicial process. In view of the constitutional requirement that the courts enforce treaties ratified by the authority of the political branches of the federal government, the ICJ's interpretation and application of the self-executing terms of the Vienna Convention must be given effect.

II. By the *Avena* Judgment, the ICJ adjudicated Mexico's claim that Mr. Medellín's individual rights under the Vienna Convention had been violated. The ICJ held that the Convention confers individual rights on detained foreign nationals and that the United States had violated Mr. Medellín's rights of consular notice and access under Article 36(1) of the Vienna Convention. The ICJ also held that Article 36(2) of the Vienna Convention requires courts in the United States, as a remedy for the Article 36(1) violation, to give "review and reconsideration" to Mr. Medellín's conviction and sentence, for the purpose of "examin[ing] the facts, and in particular the prejudice and its causes, taking account of the violation of the rights set forth in the Convention." The ICJ further held that the Convention requires that this review and reconsideration not be thwarted by application of a domestic-law procedural bar arising from Mr. Medellín's failure to raise his Vienna Convention claim before he had received actual consular notification.

The Court of Appeals recognized that the *Avena* Judgment prohibited application of the Texas contemporaneous-objection rule to Mr. Medellín's Vienna Convention claim, but nonetheless held that claim procedurally defaulted under the Texas rule. The binding obligation of the United States to adhere to the Vienna Convention and to the *Avena* Judgment in Mr. Medellín's case, however, preempts any contrary Texas state-law procedural bar by operation of the Supremacy Clause. As a result, the Texas procedural bar is neither "adequate" nor "independent" of federal law. Therefore, this Court's

prudential procedural default doctrine does not apply by its own terms—and if it did, it would itself be preempted by binding treaty obligations.

The Court of Appeals found it was bound to apply the Texas contemporaneous-objection rule by this Court's per curiam decision in *Breard v. Greene*, 523 U.S. 371 (1998). The Court of Appeals failed to recognize, however, that *Breard* arose in a fundamentally different posture than the present case. The ICJ had not made any determination on the merits of the *Breard* petitioner's Vienna Convention claim. Nor, at the time of *Breard*, had the ICJ ever considered the effect of Article 36(2) of the Vienna Convention on the application of procedural default rules prescribed by domestic law. Mr. Medellín, by contrast, is the subject of a final ICJ judgment, which is binding in his case and determines that Article 36 of the Vienna Convention entitles him to "review and reconsideration" without regard to procedural default. For these reasons, *Breard* does not control. But if the Court determines that it is necessary to revisit its holdings, the *Breard* decision should be overruled based on the ICJ's interpretation of the Vienna Convention in the *Avena* Judgment.

III. In the alternative, even if the *Avena* Judgment were held not to reflect a binding and enforceable treaty obligation, it should be recognized and enforced as a matter of comity. This Court has long acknowledged that the decisions of foreign courts are entitled to recognition and enforcement in the courts of the United States on comity grounds, regardless of whether domestic courts would have reached the same result as an original matter. No less respect is due the judgment of an international court to which the President and Senate have entrusted the resolution of a specified category of disputes. Moreover, the interest of Mr. Medellín, as an individual whose very life is at stake, in enforcing his procedural rights and the public interest in preserving the commitment of the United States to the rule of law in a sensitive matter involving relations with one of our closest neighbors, provide compelling reasons to extend comity to the *Avena* Judgment, particularly in view of the minimal burden that "review and reconsideration" would place on Texas.

The rule that treaties should be interpreted to achieve international uniformity provides an additional reason that the Court should follow the *Avena* Judgment. One of the purposes of the Vienna Convention was to establish a uniform law of consular relations. The parties to a treaty are presumed to have intended a uniform interpretation, and great weight should be given to interpretations rendered by the courts of other countries that are parties to a treaty. This presumption should be even stronger in the case of an interpretation of the Vienna Convention by the ICJ, which the parties to the Optional Protocol—including the United States and Mexico—have designated as the forum for binding resolution of disputes concerning its interpretation and application.

In the end, this case is about the rule of law. To give effect to the treaty commitments made by the democratically elected representatives of the American people, this Court should hold that the *Avena* Judgment supplies the rule of decision in Mr. Medellín's case.

ARGUMENT

I.

THE *AVENA* JUDGMENT SUPPLIES THE RULE OF DECISION IN MR. MEDELLÍN'S CASE.

A. The United States Agreed by Treaty to Comply with the Interpretation and Application of the Vienna Convention in the *Avena* Judgment.

1. The Vienna Convention, the Optional Protocol, and the *Avena* Judgment Constitute Binding International Law.

"[A] treaty is only another name for a bargain." THE FEDERALIST No. 64, at 394 (John Jay) (Clinton Rossiter ed., 1961). Consistent with basic legal principles underlying all contracts, the parties' consent invests ~~the treaty~~ with binding force. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 312(1) (1987). Also consistent with those basic principles, a nation that has validly entered into a treaty must perform its obligations under that treaty and may demand that other parties to the treaty do so as well. *Id.* § 321 cmt. a.

The obligation of parties to perform their agreements (the rule of *pacta sunt servanda*) "lies at the core of the law of international agreements and is perhaps the most important principle of international law." *Id.* The reason is obvious:

> [I]t would be impossible to find a nation who would make any bargain with us, which should be binding on them *absolutely*, but on us only so long and so far as we may think proper to be bound by it.

THE FEDERALIST No. 64, *supra*, at 394 (emphasis in original).

When a nation enters into a treaty, it undertakes an international obligation that binds all of its organs and constituent jurisdictions.[10] Accordingly, the obligations imposed by a treaty apply to all branches of government, including the judiciary and all its constituent organs.[11] In the case of a federated nation such as the United States, the obligation applies to all branches of the government of its constituent states.[12]

Here, the United States agreed with Mexico and other parties to the Vienna Convention that it would comply with the obligations imposed by the Convention, including Article 36. The United States also agreed with Mexico and the other parties to the Optional Protocol that it would submit to the "compulsory" jurisdiction of the ICJ over any "[d]ispute[] arising out of the interpretation or application" of the Vienna Convention. Optional Protocol, art. I (P.A. 138a). The two nations thereby conferred jurisdiction on the ICJ over such disputes in the only manner by which the ICJ may obtain jurisdiction—by the express consent of the nations that are

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[10] *See, e.g.*, Counter-Memorial of the United States of America at 127, *Loewen Group Inc. v. United States*, ICSID Case No. ARB(AF)/98/3 ("The United States accepts the Tribunal's ruling that conduct of an organ of the State shall be considered as an act of the State under international law, whether the organ be legislative, executive or judicial, whatever position it holds in the organisation of the State.") (internal quotation omitted) (*available at* http://www.state.gov/documents/organization/7387.pdf); ARTICLES ON STATE RESPONSIBILITY, art. 4 (International Law Commission, Draft Adopted 2001) ("The conduct of any State organ shall be considered an act of that State under international law . . . whatever its character as an organ of the central government or of a territorial unit of the State.").

[11] *E.g., Iran v. United States*, Case No. 27, Award No. 586-A27-FT, 1998 WL 1157733, ¶ 71 (Iran-U.S. Cl. Trib. June 5, 1998) ("It is a well-settled principle of international law that every international wrongful act of the judiciary of a state is attributable to that state."); IAN BROWNLIE, PRINCIPLES OF INTERNATIONAL LAW 434 (6th ed. 2003).

[12] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §321 cmt. b.

parties to the dispute.[13] By consenting to the jurisdiction of the ICJ, the United States undertook an obligation on behalf of the nation as a whole, including all its constituent organs and political subdivisions, to comply with its judgments.

2. The Vienna Convention, the Optional Protocol, and the *Avena* Judgment Constitute Binding Federal Law.

The United States Constitution allocates authority in a manner that mirrors the obligations of the United States under international law. To empower the United States to negotiate treaties with foreign powers as a single nation, the Constitution places the treatymaking power squarely in the hands of the Federal Government, by including it among the Article II powers of the Executive Branch. U.S. CONST. art. II, § 2, cl. 2. The Constitution makes this power exclusive to the federal government by expressly withdrawing from the states the power independently to make treaties or otherwise conduct foreign affairs. U.S. CONST. art. I, § 10.

The Constitution also places the treatymaking power squarely in the hands of the political branches, by providing that the President "shall have Power, with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur." U.S. CONST. art. II, § 2, cl. 2. The requirement of senatorial consent by supermajority vote ensures that the United States will enter into treaties only with the strong support of the elected representatives of the American people.

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[13] *See* David J. Bederman, et al., *International Law: A Handbook for Judges*, 35 STUD. IN TRANSNAT'L LEGAL POL'Y 76, 76-77 (2003) ("Every matter that comes before the ICJ does so because of the consent of the litigants. The only question is how that consent is manifested. The Court does not—and cannot—exercise a mandatory form of jurisdiction over states.").

Once a treaty is ratified in accordance with the Constitution, the Supremacy Clause gives it the status of federal law, preempting the laws of the individual States in the same manner as acts of Congress and the Constitution itself:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and *all Treaties made, or which shall be made*, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI, cl. 2 (emphasis added).

In other words, the Constitution makes explicit that treaties bind the nation as a whole and are not left to the possibly inconsistent policies of the individual States. "A treaty cannot be the supreme law of the land, that is of all the United States, if any act of a State Legislature can stand in its way." *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 236-37 (1796) (opinion of Chase, J.). "If we are to be one nation in any respect, it clearly ought to be in respect to other nations." THE FEDERALIST NO. 42, at 279 (James Madison) (Clinton Rossiter ed., 1961).[14]

The Framers thereby ensured that the legal effect of treaties under United States law would correspond to their legal effect under international law. The obligation of the constituent organs and political subdivisions of the United States to comply with the interpretation and application of the Vienna Convention in the *Avena* Judgment therefore follows as fully from United States law as from international law.

B. The *Avena* Judgment Is Judicially Enforceable.

1. The Constitution Makes Treaty Rights Judicially Enforceable.

Under the Articles of Confederation, enforcement of treaties had largely depended on the voluntary cooperation of state officials. This arrangement harmed the international interests of the United States; as Madison observed:

> The tendency of the States to . . . violations [of the law of nations and of treaties] has been manifested in sundry instances. . . . A rupture with other powers is among the greatest of national calamities. It ought therefore to be effectually provided that no part of a nation shall have it in its power to bring them on the whole.

1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 316 (James Madison) (Max Farrand ed., rev. ed. 1966).[15]

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[14] *See, e.g., United States v. Pink*, 315 U.S. 203, 230-31, 233 (1942) ("[S]tate law must yield when it is inconsistent with, or impairs the policies or provisions, of a treaty or an international compact or agreement. . . . No State can rewrite our foreign policy to conform to its own domestic policies. Power over external affairs is not shared by the States; it is vested in the national government exclusively."); *United States v. Belmont*, 301 U.S. 324, 331 (1937) ("In respect of all international negotiations and compacts, and in respect of our foreign relations generally, state lines disappear.").

[15] *See also, e.g.*, THE FEDERALIST No. 22, at 183 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("The treaties of the United States under the present [Articles of Confederation] are liable to the infractions of thirteen different legislatures, and as many different courts of final jurisdiction, acting under the authority of those legislatures. The faith, the reputation, the peace of the whole Union are thus continually at the mercy of the prejudices, the passions, and the interests of every member of which it is composed. Is it possible that foreign nations can either respect or confide in such a government? Is it possible that the people of America will longer consent to trust their honor, their happiness, their safety, on so precarious a foundation?").

The Framers repaired that situation. By the Supremacy Clause, they provided that "the Judges in every State shall be bound" by "all Treaties made, or which shall be made, under the Authority of the United States," just as they are bound by "[t]his Constitution, and the Laws of the United States." U.S. CONST. art. VI, cl. 2. By parallel language in Article III, they placed cases arising under treaties within the federal judicial power: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made under their Authority." U.S. CONST. art. III, § 2, cl. 1.

The Framers considered judicial enforcement of treaties essential to the maintenance of our international commitments. As James Wilson stated in the course of the Virginia debates over ratification of the Constitution,

> the provision for judicial power over cases arising under treaties, sir, will show the world that we make the faith of treaties a constitutional part of the character of the United States; that we secure its performance no longer nominally, for the judges of the United States will be enabled to carry it into effect.

2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 490 (Jonathan Elliot ed., 2d ed. 1881). Hamilton also underscored the importance of the role of the courts, and in particular of this Court, in interpreting and enforcing treaties:

> The treaties of the United States, to have any force at all, must be considered as part of the law of the land. Their true import . . . must, like all other laws, be ascertained by judicial determinations. To produce uniformity in these determinations, they ought to be submitted, in the last resort, to one supreme tribunal.

THE FEDERALIST NO. 22, at 150 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

Consistent with the constitutional design, this Court has long held that a ratified treaty

> is a law of the land as an act of Congress is, *whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined.* And when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would to a statute.

Edye v. Robertson (The Head Money Cases), 112 U.S. 580, 598-99 (1884) (emphasis added).[16] Where a treaty is "self-executing"—that is, susceptible to implementation without legislation—the rights conferred by the treaty are directly enforceable in United States courts. *See, e.g., Cook v. United States*, 288 U.S. 102, 119 (1933) (applying self-executing treaty to bar enforcement of federal statute); *United States v. The Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801) ("where a treaty is the law of the land, and as such affects the rights of parties litigating in court, that treaty as much binds those rights and is as much to be regarded by the court as an act of congress"); *see also Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2767 (2004) (treaty declared non-self-executing at time of ratification "did not itself create obligations enforceable in the federal courts" though it "bind[s] the United States as a matter of international law").

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[16] *See, e.g., Maiorano v. Baltimore & Ohio R.R. Co.*, 213 U.S. 268, 272-73 (1909); *Doe v. Braden*, 57 U.S. 635, 657 (1854).

2. This Court and Other Courts in the United States Have Routinely Enforced Rights Conferred by Treaty Upon Foreign Nationals.

The power of the President and the Senate to make treaties under Article II "extends to all proper subjects of negotiation between our government and the governments of other nations." *Geofroy v. Riggs*, 133 U.S. 258, 266 (1890).[17] "One of the most important and delicate of all international relationships, recognized immemorially as a responsibility of government, has to do with the protection of the just rights of a country's own nationals when those nationals are in another country." *Hines v. Davidowitz*, 312 U.S. 52, 64 (1941). As a result, the reciprocal protection of the person and property of nationals abroad has been a frequent subject of treatymaking by the United States and its treaty partners from this nation's founding through the present day.[18]

Accordingly, this Court has routinely given effect to treaties conferring rights on foreign nationals.[19] Judicial

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[17] The scope of the treaty power is therefore not confined to the legislative powers of Congress under Article I. *See United States v. Lara*, 541 U.S. 193, 124 S. Ct. 1628, 1633-34 (2004) ("treaties made pursuant to [Article II] can authorize Congress to deal with matters with which otherwise Congress could not deal") (quotation marks omitted; quoting *Missouri v. Holland*, 252 U.S. 416, 433 (1920)).

[18] *See, e.g.*, U.S. Dep't of State, Updated U.S. Model Bilateral Investment Treaty 2004, *at* http://www.state.gov/e/eb/rls/othr/38602.htm; U.S. Dep't of State, U.S. Bilateral Investment Treaty Program, Sept. 15, 2004, *at* http://www.state.gov/e/eb/rls/fs/22422.htm (United States is currently party to 46 bilateral investment treaties and numerous treaties of friendship, commerce, and navigation). For early examples, *see, e.g.*, Treaty of Amity, Commerce, and Navigation, Nov. 19, 1794, U.S.-Gr. Br., 12 Bevans 13, T.S. No. 105 (the Jay Treaty); Treaty of Amity and Commerce, Feb. 6-Sept. 1, 1778, U.S.-Fr., 7 Bevans 763, T.S. No. 83.

[19] *See, e.g.*, *Kolovrat v. Oregon*, 366 U.S. 187 (1961) (enforcing Yugoslavian citizens' right under U.S.-Serbia treaty to inherit personal

(footnote continued)

enforcement of those treaties has frequently limited the authority of the state and federal governments to prosecute crimes.[20] And United States courts have regularly applied the consular-immunity provisions of the Vienna Convention to decide consular officials' and employees' claims of immunity from criminal prosecution.[21]

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property located in Oregon); *Cheung Sum Shee v. Nagle*, 268 U.S. 336 (1925) (holding that U.S.-China treaty prevented mandatory exclusion of wives and minor children of Chinese merchants under Immigration Act of 1924); *Asakura v. Seattle*, 265 U.S. 332 (1924) (restraining city from applying law that noncitizens could not work as pawnbrokers to Japanese citizens because it would violate U.S.-Japan treaty); *Hauenstein v. Lyndham*, 100 U.S. 483 (1880) (enforcing treaties assuring alien's right to inherit); *Chirac v. Chirac*, 15 U.S. (2 Wheat.) 259 (1817) (enforcing treaties granting French citizens right to hold real property); *Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. (7 Cranch) 603 (1813) (enforcing treaty protecting British property owners against Virginia forfeiture); *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796) (enforcing treaty protecting British creditor against cancellation of debt by Virginia).

[20] *See, e.g.*, *United States v. Rauscher*, 119 U.S. 407 (1886) (ordering dismissal of indictment where prosecution was barred by extradition treaty with Great Britain); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561-62 (1832) (reversing Georgia state conviction that violated treaty with Cherokee Nation); *Ware*, 3 U.S. (3 Dall.) at 244 (opinion of Chase, J.) (noting that state courts were obligated to dismiss criminal cases under treaty with Great Britain); *see also United States v. Alvarez-Machain*, 504 U.S. 655, 659-61 (1992) (discussing application of *Rauscher*). Indeed, one of our earliest treaties, the 1783 Treaty of Paris that ended the Revolutionary War, barred criminal prosecutions on charges of aiding the British in the war; and that provision was judicially enforced even prior to the adoption of the Constitution. *See Respublica v. Gordon*, 1 Dall. 233, 233 (Pa. 1788) (dismissing treason prosecution because "any proceedings against . . . the Defendant, would contravene an express article in the treaty of peace and amity, entered into, between the United States of America and Great Britain") (cited in *Ware*, 3 U.S. (3 Dall.) at 244).

[21] *See Commonwealth v. Jerez*, 390 Mass. 456, 457 N.E.2d 1105 (1983) (affirming dismissal of a state criminal complaint against foreign consular officer pursuant to Article 43 of the Vienna Convention, which

(footnote continued)

Finally, this Court has expressly recognized that rights of detained foreign nationals under consular conventions may be enforced under the federal habeas corpus statute, which allows an individual to challenge "custody in violation of the . . . treaties of the United States." 28 U.S.C. § 2241(c)(3) (2004). In *Wildenhus's Case*, 120 U.S. 1 (1887), the Court considered a Belgium-U.S. bilateral consular-relations convention that allocated criminal jurisdiction between the Belgian consul and the local courts with respect to sailors on Belgian ships in American ports. New Jersey sought to prosecute a Belgian crewmember for a homicide committed in the port of Jersey City. Asserting a right under the convention to try the crewmember, the Belgian consul sought a writ of habeas corpus.

The Court observed that the bilateral consular convention was "part of the supreme law of the United States, and has the same force and effect in New Jersey that it is entitled to elsewhere." *Id.* at 17. It therefore held that if the convention "gives the consul of Belgium exclusive jurisdiction over the offence which it is alleged has been committed within the territory of New Jersey, we see no reason why he may not enforce his rights under the treaty by writ of habeas corpus in any proper court of the United States." *Id.*[22] The Court then

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provides consular officers and employees with limited immunity from judicial jurisdiction); *see also United States v. Cole*, 717 F. Supp. 309, 321-25 (E.D. Pa. 1989) (Vienna Convention controls claim of consular immunity from criminal prosecution); *State v. Doering-Sachs*, 652 So. 2d 420, 422-24 (Fla. Dist. Ct. App. 1995) (same); *Illinois Commerce Comm'n v. Salamie*, 54 Ill. App. 3d 465, 469-475, 369 N.E.2d 235, 238-242 (1977) (same); *Silva v. Superior Court*, 52 Cal. App. 3d 269, 280, 125 Cal. Rptr. 78, 85-87 (1975) (same).

[22] *See also Johnson v. Browne*, 205 U.S. 309 (1907) (affirming grant of habeas corpus discharging prisoner who had been tried and convicted in federal court in violation of extradition treaty with Canada); *Chew Heong v. United States*, 112 U.S. 536 (1884) (reversing denial of habeas

(footnote continued)

applied the provisions of the convention to determine whether the individual should be tried before a New Jersey state court or a Belgian consul. *Id.*[23]

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corpus to Chinese laborer detained by federal officials in violation of immigration treaty with China). Common-law courts in England long recognized the availability of the writ of habeas corpus to challenge the detention of an alien in violation of international law. *See, e.g., The Three Spanish Sailors' Case*, 96 Eng. Rep. 775 (C.P. 1779); *The King v. Schiever*, 97 Eng. Rep. 551 (K.B. 1759) (cited in *Rasul v. Bush*, 124 S. Ct. 2686, 2696 n.11 (2004), and *INS v. St. Cyr*, 533 U.S. 289, 301 n.16 (2001)).

[23] Federal habeas corpus has long served to enable the federal judiciary to enforce the rights of foreign nationals under international law when the state courts, in criminal proceedings, have failed to give proper effect to those rights. In the pre-Civil War era, a New York state murder prosecution that allegedly violated international law brought the nation to the brink of war with Great Britain. *See* Martin A. Rogoff & Edward Collins, Jr., *The Caroline Incident and the Development of International Law*, 16 BROOK. J. INT'L L. 493, 496 (1990). In response, Congress expanded the federal habeas corpus statute, which had previously applied only to prisoners in federal custody, to empower federal courts to adjudicate claims of some noncitizens detained in state custody in violation of the law of nations. *See* Act of Aug. 29, 1842, ch. 252, 5 Stat. 539 (codified at 28 U.S.C. § 2241(c)(4)); Cong. Globe, 27th Cong., 2nd Sess. 536-37 (1842) (remarks by Sen. Choate) (amendment was necessary to allow federal government to fulfill its obligation of preserving national peace); *id.* at 444 (remarks by Sen. Berrien) (object of statute "was to allow a foreigner . . . prosecuted in one of the States of the Union for an offence committed in that State" to bring an international-law issue "before the only competent judicial power to decide upon matters invoked in foreign relations or the law of nations"); *cf. Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2756-59 (2004) (noting that federal Alien Tort Statute was passed by Congress in part to ensure compliance by states with the law of nations).

3. Mr. Medellín's Rights Under the *Avena* Judgment Are Judicially Enforceable.

Judicial enforcement of the *Avena* Judgment is required by the foreign policy judgments of the political branches manifest in four international treaties to which the United States is party: the Vienna Convention, the Optional Protocol, the United Nations Charter, and the Statute of the ICJ. Because the rights conferred by the Vienna Convention are self-executing, and because the United States agreed to submit to binding resolution by the ICJ of disputes concerning the interpretation and application of the Vienna Convention, Mr. Medellín's rights under the *Avena* Judgment are enforceable by the courts of the United States without any further executive or legislative action.

As an initial matter, it has never been contested that the Vienna Convention is self-executing, in light of the circumstances of its ratification and the nature of the rights conferred. When presenting the Vienna Convention to the Senate for its advice and consent, the Executive Branch explicitly represented that the obligations imposed by the Convention were "entirely self-executive and do[] not require any implementing or complementing legislation." *See Vienna Convention on Consular Relations, Hearing Before Senate Committee on Foreign Relations*, S. EXEC. REP. NO. 91-9, at 5 (1969) (statement of J. Edward Lyerly, Deputy Legal Adviser for Administration, U.S. Department of State).[24]

In the thirty-five years since the United States entered into the Vienna Convention, neither the President nor Congress has sought to pass any legislation implementing the obligations of the United States under that instrument. Ordinarily, "if the Executive Branch has not requested implementing legislation and Congress has not enacted such legislation, there is a strong presumption that the treaty has been considered self-executing by the political branches, and should be considered self-executing by courts." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 111 reporters' notes 5. Here, the Executive Branch has gone one step further. In a booklet that the State Department currently provides to state and local law-enforcement agencies and displays on its website, it advises:

> The obligations of consular notification and access are not codified in any federal statute. Implementing legislation is not necessary (and the VCCR and bilateral agreements are thus "self-executing") because executive, law enforcement, and judicial authorities can implement these obligations through their existing powers.

UNITED STATES DEP'T OF STATE, CONSULAR NOTIFICATION AND ACCESS 44, *available at* http://travel.state.gov/pdf/CNA_book.pdf.[25]

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[24] *See also* 21 U.S.T. 77, 185 (Proclamation of Ratification by President Nixon) ("the [Vienna] Convention and Protocol . . . and every article and clause thereof shall be observed and fulfilled with good faith, on and after December 24, 1969, by the United States of America and by the citizens of the United States of America and all other persons subject to the jurisdiction thereof").

[25] This case is therefore fundamentally different from *Comm. of United States Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929 (D.C. Cir. 1988). In the *Nicaragua* case, the ICJ judgment addressed rules of customary international law concerning the use of force, an area of executive competence, while here the obligation arises under a self-executing treaty and is readily susceptible of judicial enforcement. Moreover, in the *Nicaragua* case, the U.S. nationals who sought to enforce the ICJ judgment had no relationship to the ICJ case, while here, by contrast, the ICJ has adjudicated both Mr. Medellín's and Mexico's rights. Finally, in the *Nicaragua* case, Congress had enacted legislation

(footnote continued)

Moreover, Article 36 of the Vienna Convention affords rights to foreign nationals (to receive information and seek consular assistance) and imposes obligations on United States authorities (to provide information and permit consular assistance) that operate in the context of criminal proceedings and are entirely comparable to the treaty obligations and rights that United States courts have long enforced on behalf of foreign nationals without implementing legislation. *See* Part I.B.2 above; Restatement (Third) of Foreign Relations Law § 111 reporters' notes 5 (this Court has generally given effect to "agreements conferring rights on foreign nationals . . . without any implementing legislation, their self-executing character assumed without discussion"). Article 36 of the Vienna Convention does not call for the enactment of a statute or the performance of any other action, such as the appropriation of money from the Treasury, that can only be carried out by act of Congress. *See* Restatement (Third) of Foreign Relations Law § 111(4)(c) & cmt. h.

Likewise, the right to review and reconsideration that resulted from the ICJ's interpretation and application of the Vienna Convention in Mr. Medellín's case is not just readily susceptible to judicial enforcement; it can *only* be provided by judicial process. Specifically, as a remedy for the violation of Mr. Medellín's Article 36 rights, the ICJ ordered that "the courts of the United States" provide review and reconsideration of Mr. Medellín's conviction and sentence by "examin[ing] the facts, and in particular the prejudice and its causes, taking account of the violation of the rights set forth in the Convention." P.A. 253a; ¶ 122; *see also* P.A. 248a-249a, ¶¶ 113-114; P.A. 274a, ¶ 153(9). As the ICJ

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by which the United States determined to take action inconsistent with the ICJ judgment, while here there is no such legislation.

recognized, that is a quintessentially judicial task. P.A. 262a, ¶ 140.

Compliance with the ICJ's judgment is a binding international obligation. When a party agrees to the jurisdiction of a designated tribunal, it agrees to abide by its decision. *Smith v. Morse*, 76 U.S. (9 Wall.) 76, 82 (1869) ("The law implies an agreement to abide [by] the result of an arbitration from the fact of submission."). Hence, an agreement to submit to the compulsory jurisdiction of an international tribunal entails a promise to comply with the result. *La Abra Silver Mining Co. v. United States*, 175 U.S. 423, 463 (1899) ("[A]n award by a tribunal acting under the joint authority of two countries is conclusive between the governments concerned and must be executed in good faith unless there be ground to impeach the integrity of the tribunal itself.").[26] Here, the United States submitted to the compulsory jurisdiction of the ICJ in disputes concerning the interpretation and application of the Vienna Convention. It therefore must comply with the ICJ's interpretation and application of the Convention in *Avena*.

The State Department has emphatically affirmed the obligation to comply with ICJ judgments in the context of the very category of treaty to which the Optional Protocol belongs. In 1985, in response to the ICJ's decision on jurisdiction in *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, 1984 I.C.J. 392 (Nov. 26), the United States withdrew its general consent to the compulsory jurisdiction of the ICJ. *See* U.S. Dep't of State, *U.S. Terminates Acceptance of ICJ Compulsory Jurisdiction*,

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[26] *See, e.g.*, Restatement (Third) of Foreign Relations Law § 903 cmt. g (1987) (judgment of ICJ is binding on party that submitted to its jurisdiction); Shabtai Rosenne: The World Court: What it Is and How it Works 67 (Terry D. Gill, ed., 6th ed. 2003) (same).

DEP'T OF STATE BULL., Jan. 1986, at 67 (letter from U.S. Secretary of State to U.N. Secretary-General, Oct. 7, 1985). At the same time, it explicitly reaffirmed its "acceptance of the World Court's jurisdiction under Article 36(1) of its Statute"—that is, under the provision conferring jurisdiction when specially provided for by a treaty such as the Optional Protocol. *Id.* (Department Statement, Oct. 7, 1985). The State Department explained to the Senate Foreign Relations Committee that the United States had chosen to limit its consent to ICJ jurisdiction precisely because it fully accepted its obligation to comply when it had consented:

> We are a law-abiding nation, and when we submit ourselves to adjudication of a subject, we regard ourselves as obliged to abide by the result.

Id. at 70 (statement of Legal Adviser Abraham D. Sofaer, Dec. 4, 1985).[27]

The obligation to comply with the *Avena* Judgment results just as inexorably from the decision of the political branches to accede to the United Nations Charter and the

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[27] Unlike the Optional Protocol to the Vienna Convention, the former consent of the United States to general ICJ jurisdiction had been subject to a reservation, commonly known as the Connally Amendment, which excluded the ICJ's jurisdiction in matters "essentially within the domestic jurisdiction of the United States as determined by the United States." *Declaration on the Part of the United States of America*, proviso (b), 61 Stat. 1218, 1 U.N.T.S. 9 (Aug. 14, 1946). By acceding to the Optional Protocol to the Vienna Convention without a comparable reservation, the United States deliberately "eliminate[d] the application" of the Connally Amendment in "cases which might arise over the meaning or application of the consular convention," the Executive Branch having concluded that such a reservation was not warranted in view of "the subject matter of the Convention." S. EXEC. REP. No. 91-9, at 2 (1969) (report of Senator Fulbright); *id.* at 19 (statement of J. Edward Lyerly, Deputy Legal Adviser for Administration, U.S. Department of State).

Statute of the ICJ. The Charter could not be more explicit: "Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party." U.N. CHARTER art. 94, para. 1 (P.A. 139a). The Statute is to the same effect: "A decision of the Court has no binding force *except as between the parties and in respect of that particular case*." ICJ Statute, art. 59 (P.A. 141a) (emphasis added).

It follows that the binding interpretation and application of the self-executing obligations of the Vienna Convention in the *Avena* Judgment must be given effect in the courts of the United States. By the Optional Protocol, the President and the Senate agreed that the ICJ would both interpret and apply the Vienna Convention. When the parties to a substantive agreement also agree that disputes arising from that agreement shall be resolved by a specified dispute-resolution procedure, the decision that results from that procedure governs the parties' obligations under the agreement no less than if the terms of the decision had been written into the agreement itself.[28] In other words, if an agreement to substantive rights and obligations is accompanied by an agreement that a particular process must be followed to determine the interpretation and application of those rights and obligations, then the result of that process necessarily defines those rights and obligations with the same force and effect as the original agreement. Giving a treaty's self-executing provisions a meaning and application different from the one that the parties agreed is controlling would be inconsistent with the treaty itself. It follows that, just as the rights conferred by the Vienna Convention are judicially enforceable, so too are the interpretation and application of those rights in the *Avena* Judgment.

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[28] *See Eastern Assoc. Coal Corp. v. United Mine Workers, Dist. 17*, 531 U.S. 57, 62 (2000) (when parties "have granted to [an] arbitrator the authority to interpret the meaning of their contract's language . . . the arbitrator's award [must be treated] as if it represented an agreement between [the parties] as to the proper meaning of the contract[]"); *cf.* Response of Respondent United States of America to Methanex's Submission Concerning the NAFTA Free Trade Commission's July 31, 2001 Interpretation, *Methanex Corp. v. United States*, Arbitration Under Chapter 11 of the North American Free Trade Agreement and the UNCITRAL Arbitration Rules (applying an interpretation of a treaty by Free Trade Commission, a body empowered to issue "binding" interpretations of the NAFTA, represents not a retroactive application of a new rule but "an application of the correct interpretation of the governing law, which remains unchanged") (*available at* http://www.state.gov/documents/organization/6028.pdf).

By the direction of the political branches, the United States was a party to *Avena*, and it fully participated in the case. The ICJ has now issued a decision that is "binding on [the United States and Mexico] in respect of that particular case." ICJ Statute, art. 59 (P.A. 141a).[29] The courts are an organ of the United States and hence are bound by its treaty commitments under both international law and the United States Constitution. *See* Parts I.A.2, I.B.1 above. And the ICJ's decision calls for compliance by the courts, not the executive or legislative authorities. By operation of the treaty obligations undertaken by the political branches, the courts of the United States must now "comply with the [*Avena*] decision," U.N. CHARTER art. 94, para. 1 (P.A. 139a),[30] by

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[29] *See* 3 SHABTAI ROSENNE, THE LAW AND PRACTICE OF THE INTERNATIONAL COURT, 1920-1996, at 1655-56 (3d ed. 1997) (ICJ judgment "creates a res judicata"); *cf. Nevada v. United States*, 461 U.S. 110, 135 (1983) (entity whose interests were represented by United States in litigation was bound by judgment).

[30] *See* Sandra Day O'Connor, *Federalism of Free Nations*, *in* INTERNATIONAL LAW DECISIONS IN NATIONAL COURTS 13, 18-19 (Thomas M. Franck & Gregory H. Fox eds., 1996) ("[T]he role of international tribunals and their influence on the operation of domestic *(footnote continued)*

treating the *Avena* Judgment as conclusive of Mr. Medellín's rights under the Convention.

Thus, a failure by the courts of the United States to give effect to the Vienna Convention as conclusively interpreted and applied by the ICJ would breach the international obligations of the United States. *See* Part I.A.1 above. Conversely, it is a judicial act—review and reconsideration in accord with *Avena*—that will ensure compliance. It is therefore incumbent upon this Court to bring the state and federal courts of the United States into line with the nation's treaty commitments.

In short, by virtue of the consent of the United States to submit disputes concerning the "interpretation" and "application" of the Convention to the compulsory jurisdiction of the ICJ, the obligations under the *Avena* Judgment constitute obligations under the Convention itself in Mr. Medellín's case. Because the Convention is self-executing, the *Avena* Judgment supplies the rule of decision in his case.

II.

THE *AVENA* JUDGMENT REQUIRES REVERSAL OF THE JUDGMENT OF THE COURT OF APPEALS.

A. The Court of Appeals Should Have Given Effect to the Interpretation and Application of Mr. Medellín's Vienna Convention Rights in the *Avena* Judgment.

By the *Avena* Judgment, the ICJ expressly adjudicated Mexico's claim that Mr. Medellín's rights under the Vienna Convention had been violated, and it prescribed a remedy for that violation. The ICJ first held, reiterating its judgment in

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courts are governed by the foreign policy judgments of the President and Congress made through the governing international treaties and agreements.").

LaGrand, that the Convention confers rights on the detained national as well as his or her State of nationality. P.A. 214a-215a, ¶ 40. Hence, the Convention confers rights on Mr. Medellín.

Next, the ICJ held that the United States—in Mr. Medellín's case, in the person of the competent Texas authorities—had violated Mr. Medellín's right under Article 36(1)(b) of the Vienna Convention to be informed of his right to have the Mexican consulate notified of his detention and to have the consulate notified; his right under Article 36(1)(a) and (c) to communicate with Mexican consular officers and receive visits from them; and his right under Article 36(1)(c) to have Mexican consular officers arrange legal representation. P.A. 243a-245a, ¶ 106 (*Avena* Judgment); *see also* P.A. 131a (Court of Appeals opinion) ("The state concedes that Petitioner was not notified of his right to contact the Mexican consul.").

The ICJ also granted Mr. Medellín a remedy for the violation of Article 36(1). Specifically, while it rejected Mexico's request for annulment of the conviction and sentence, P.A. 255a, ¶ 123 (*Avena* Judgment), the ICJ ordered that the courts of the United States must provide "review and reconsideration" of Mr. Medellín's conviction and sentence. P.A. 253a, 273a, ¶¶ 121-122, 153(9). The ICJ determined that this remedy is required by Article 36(2) of the Convention, which mandates that the procedures for enforcing Article 36(1) be sufficient to give its purposes "full effect." P.A. 270a, ¶ 152 (citing Vienna Convention, art. 36(2)).

The purpose of the "review and reconsideration" is to "examine the facts, and in particular the prejudice and its causes, taking account of the violation of the rights set forth in the Convention." P.A. 253a, ¶ 122. As a result, the ICJ also held that the required review and reconsideration could not be thwarted by the application of a domestic-law procedural bar arising from the failure of a national deprived of his notification rights timely to raise the issue in a domestic proceeding. P.A. 247a-249a, 258a-259a, ¶¶ 112-113, 133-134. Finally, the ICJ held that the court conducting the review and reconsideration would need to remedy any prejudice caused by the violation. P.A. 253a, 261a, ¶¶ 122, 138. The ICJ also made clear that "review and reconsideration" must take place within the "judicial process." P.A. 262a, ¶¶ 140-141.

The application of the *Avena* Judgment to the issues decided by the Court of Appeals is straightforward. As the Court of Appeals recognized, the ICJ squarely held that the Vienna Convention confers rights on the detained national as well as the sending state. P.A. 132a-133a (Court of Appeals opinion, citing *Avena* and *LaGrand*); *see also Breard v. Greene*, 523 U.S. 371, 376 (1998) ("[T]he Vienna Convention . . . arguably confers on an individual the right to consular assistance following arrest."). Hence, because the *Avena* Judgment supplies the rule of decision, the Court of Appeals was required to hold that Mr. Medellín had an "individually enforceable right" under Article 36.

As the Court of Appeals also recognized, the ICJ held that in the circumstances here, "procedural default rules cannot bar review of a petitioner's claim." P.A. 131a-132a (citing *Avena* and *LaGrand*). Hence, because the *Avena* Judgment supplies the rule of decision, the Court of Appeals was required to hold that Mr. Medellín's procedural default under Texas law could not operate to bar the review and reconsideration granted him by the ICJ. Recognizing that its decision contravened the *Avena* Judgment, the Court of Appeals nonetheless applied a Texas contemporaneous-objection rule to hold Mr. Medellín's claim procedurally defaulted. P.A. 131a-132a.

A state-law procedural bar, however, cannot foreclose federal habeas review unless it is both "adequate" and "independent" of federal law. *E.g.*, *Lee v. Kemna*, 534 U.S. 362, 375 (2002). Mr. Medellín has a right under the Vienna Convention, as interpreted and applied in the *Avena* Judgment, not to have the Texas procedural bar applied to prevent review and reconsideration of his conviction and sentence in connection with his Vienna Convention claim. That right is a federal right, by virtue of the status of the Vienna Convention as preemptive federal law under the Supremacy Clause and the agreement of the United States that decisions of the ICJ are binding in cases concerning the interpretation and application of the Convention. *See* Part I above. As the Executive Branch made clear when it presented the Vienna Convention to Congress for ratification, "[t]o the extent that there are conflicts with Federal legislation or State laws the Vienna Convention, after ratification, would govern." *Vienna Convention on Consular Relations, Hearing Before the Senate Committee on Foreign Relations*, S. EXEC. REP. No. 91-9, at 18 (statement of J. Edward Lyerly, Deputy Legal Adviser for Administration, U.S. Department of State).

Where, as here, a state-law procedural rule is itself preempted by federal law, the rule is neither "adequate" nor "independent" of federal law. *See Int'l Longshoremen's Ass'n v. Davis*, 476 U.S. 380, 388, 398-99 (1986). Because no "independent and adequate" state-law ground is present, the procedural default doctrine does not apply in the present case by its own terms. *See, e.g.*, *Lee*, 534 U.S. at 387.

Moreover, the doctrine that state procedural default rules apply in the context of federal habeas corpus proceedings is a judicially created, nonjurisdictional, prudential rule. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). No federal constitutional provision or statute requires its application. *Id.*[31] It therefore cannot apply where it is inconsistent with a statute or treaty duly adopted by the political branches—here, the commitment of the United States to abide by the Vienna Convention, as interpreted and applied in judgments of the ICJ. U.S. CONST. art. VI. In this circumstance, the *Avena* Judgment would supersede the prudential doctrine that state procedural requirements should ordinarily be given effect in federal habeas cases even if that doctrine were otherwise applicable.

In short, whether the Court of Appeals should have issued the certificate of appealability on Mr. Medellín's Vienna Convention reduces to the single question of whether the *Avena* Judgment supplies the rule of decision in this case. As a matter of constitutional structure and principle, it plainly does. *See* Part I above.

This Court should so hold. On certiorari review of the denial of an application for a certificate of appealability, this Court necessarily states what the law is in order to correct the erroneous resolution of legal questions by the courts below. *See Tennard v. Dretke*, 124 S. Ct. 2562, 2573 (2004) (on review of denial of COA, holding that Court of Appeals applied improper legal standard); *Miller-El v. Cockrell*, 537 U.S. 322, 341 (2003). In reversing the Court of Appeals on its denial of Mr. Medellín's application for a certificate of appealability, this Court should hold that the *Avena* Judgment supplies the rule of decision in his case. At a minimum, this Court should hold that reasonable jurists would find debatable the disposition of Mr. Medellín's claims in view of the interpretation and application of his rights under the Convention in the *Avena* Judgment, and that the issues presented here are "adequate to deserve encouragement to proceed further," entitling him to a certificate of appealability. *Miller-El v. Cockrell*, 537 U.S. at 327.

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[31] Consistent with its prudential origins, the doctrine is subject to judicially-created exceptions. Specifically, this Court has crafted an exception to procedural default when the petitioner can show cause and prejudice or a fundamental miscarriage of justice. *See, e.g.*, *Coleman*, 501 U.S. at 750; *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977).

B. This Court's Per Curiam Opinion in *Breard* Does Not Bar Relief In This Case.

The only reason that the Court of Appeals did not apply the *Avena* Judgment to Mr. Medellín's application was its view that, on the issue of whether the Vienna Convention conferred individual rights on the detained nationals, it was bound by prior precedent of its own, and on the issue of whether it should give effect to the Texas procedural bar, it was bound by this Court's per curiam opinion in *Breard v. Greene*, 523 U.S. 371 (1998). P.A. 131a-133a. *Breard*, however, is distinguishable because, unlike here, the *Breard* Court did not have before it a final and binding interpretation and application of the Vienna Convention in the form of a final judgment by the ICJ adjudicating the petitioner's rights.

In its per curiam opinion in *Breard*, this Court declined to stay the imminent execution of a foreign national who had been convicted and sentenced to death in proceedings that Virginia conceded had violated the Vienna Convention, but who had procedurally defaulted the Vienna Convention claim. The Court observed that the Convention "arguably" conferred rights on an individual detainee as well as on the foreign country of which the detainee was a national. *Id.* at 376. It stated, however, that as a matter of international law, "absent a clear and express statement to the contrary, the procedural rules of the forum State govern the implementation of the treaty in that State." *Id.* at 375. The Court found this rule of international law "embodied in the Vienna Convention itself" by virtue of its Article 36(2). *Id.* The Court noted that that provision states that "the rights expressed in the Convention 'shall be exercised in conformity with the laws and regulations of the receiving State,' provided that 'said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended.'" *Id.* at 375 (quoting Vienna Convention, art. 36(2) (P.A. 138a)). Hence, the Court stated, the Convention did not preclude the United States from giving effect to Breard's procedural default under Virginia law. *Id.* at 375-77 (citing *Wainwright v. Sykes*, 433 U.S. 72 (1977)).

At the time of the *Breard* order, the ICJ had not addressed the merits of Mr. Breard's claim and, of course, had not rendered a final judgment in either *LaGrand* or *Avena*. It also had never before addressed Article 36(2) of the Vienna Convention (P.A. 138a), which was discussed by this Court in *Breard*. In the *Avena* Judgment, the ICJ interpreted and applied that Article and, specifically, the "full effect" proviso, in a case adjudicating Mr. Medellín's own rights. *See* P.A. 194a-195a, 247a-249a; ¶¶ 14(3), 112-113. Consistent with its earlier holding in *LaGrand*, the ICJ held that, where the United States had failed in its Article 36(1) notification obligations, Article 36(2) precluded it from applying a procedural bar that would prevent the review and reconsideration that ICJ had ordered as a remedy for that violation. P.A. 247a-249a, ¶¶ 112-113. The ICJ thereby identified in Article 36(2) "a clear and express statement" as to the implementation of the Convention of the sort that this Court had recognized in *Breard* would take precedence over domestic procedural rules. *Breard*, 523 U.S. at 375.

Given the interpretation and application of Mr. Medellín's own rights in the *Avena* Judgment, Mr. Medellín stands in a fundamentally different posture than did Mr. Breard. Mr. Medellín's rights were adjudicated in a final and binding ICJ judgment; Mr. Breard's were not. The *Breard* decision therefore does not control this case.

In *Torres v. Oklahoma*, No. PCD-04-442 (Okla. Crim. App. May 13, 2004) (P.A. 142a-163a), the Oklahoma Court of Criminal Appeals—the only other court in the United States to consider the effect of the *Avena* Judgment in the case of a Mexican national subject to the judgment—recognized that *Breard* no longer controls with respect to Mexican nationals whose rights were determined in the *Avena* Judgment. The Oklahoma court's precedent decided prior to the *Avena* Judgment would have required it to disregard the ICJ's judgment in *LaGrand* in favor of *Breard*'s treatment of procedural default. *See Valdez v. State*, 46 P.3d 703 (Okla. 2002). But as Judge Chapel explained in his concurrence, the issuance of the *Avena* Judgment made the case one "of first impression." P.A. 145a & n.1 (distinguishing *Valdez*). As a result, the *Torres* court ordered an evidentiary hearing on the Vienna Convention claim of Osvaldo Torres whose Vienna Convention claim had earlier been held defaulted. P.A. 142a-144a.

If, however, the Court concludes that it must revisit the issues decided in *Breard*, *Breard* should be overruled. As definitively determined by the ICJ in *LaGrand* and *Avena*, applying procedural default rules to prevent enforcement of Vienna Convention rights is inconsistent with Article 36 of the Convention when the competent authorities of the detaining country have themselves failed in their Vienna Convention obligations. P.A. 247a-249a, ¶¶ 111-113 (*Avena* Judgment); *LaGrand*, ¶¶ 88-91.

The *Breard* opinion carries little force as a matter of stare decisis. *Breard* denied four applications for discretionary relief, consisting of two petitions for certiorari, a motion for leave to file an original bill of complaint, and a petition for an original writ of habeas corpus. 523 U.S. at 373-75, 378-79. As an opinion accompanying the denial of discretionary writs, the *Breard* decision "cannot have the same effect as decisions on the merits." *Teague v. Lane*, 489 U.S. 288, 296 (1989) (regarding prior denial of petition for writ of certiorari). Moreover, the *Breard* decision is a per curiam opinion issued without full briefing or oral argument. This Court has previously acknowledged its "customary skepticism toward per curiam dispositions that lack the reasoned consideration of a full opinion," even when issued on the merits. *U.S. Bancorp Mortgage Co. v. Bonner Mall P'ship*, 513 U.S. 18, 24 (1994). That rule should apply with special force to a decision issued in the circumstances of *Breard*—not only without full briefing or oral argument, but in hurried circumstances, on the eve of an execution. *See* 523 U.S. at 378; *see also Federal Republic of Germany v. United States*, 526 U.S. 111 (1999) (denying leave to file case on eve of execution). In any event, the international dimension of this case would warrant a fully considered reexamination of *Breard* if the *Avena* Judgment had not made it inapplicable.

III.
THIS COURT SHOULD GIVE EFFECT TO THE *AVENA* JUDGMENT IN THE INTEREST OF COMITY AND UNIFORM TREATY INTERPRETATION.

Because the *Avena* Judgment interpreted and applied Mr. Medellín's own rights under the Vienna Convention, the Court of Appeals had an obligation under the Supremacy Clause to give that adjudication effect as the rule of decision in Mr. Medellín's case. Even if no such obligation were present, however, the Court of Appeals should have recognized the judgment as a matter of international comity in Mr. Medellín's case and given effect to the judgment as an authoritative interpretation and application of the judgment in a case, such as that of Mr. Medellín, involving a national of a party to the Convention.

A. The *Avena* Judgment Should Be Recognized on Comity Grounds.

This Court has long acknowledged that the decisions of foreign courts are entitled to recognition and enforcement in the courts of the United States on grounds of comity. In *Hilton v. Guyot*, 159 U.S. 113 (1895), the Court explained:

> "Comity," in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.

Id. at 163-64. Under the principle of comity and similar doctrines, the Court has repeatedly counseled respect for the competence of foreign courts and the efficacy of their proceedings.[32]

No less respect is due the judgment of an international court to which the President and Senate have entrusted the resolution of a specified category of disputes. *See* Sandra Day O'Connor, *Federalism of Free Nations*, *in* INTERNATIONAL LAW DECISIONS IN NATIONAL COURTS 13, 18 (Thomas M. Franck & Gregory H. Fox eds., 1996) (discussing value of "mutual trust and respect" between national and international courts).[33] By the Optional Protocol, the United States agreed to submit disputes "arising out of the interpretation and application" of the Vienna Convention to the ICJ, the principal judicial organ of the United Nations; was given a full and fair opportunity to litigate the dispute there; and in fact took full advantage of that opportunity. *See* Statement of the Case above. In these circumstances, the courts of the United States should recognize and enforce the *Avena* Judgment.

The review and reconsideration directed by the *Avena* Judgment constitutes far less of an intrusion into the domestic criminal justice system than did the release of the convicted criminal ordered by this Court in *Johnson v. Browne*, 205 U.S. 309 (1907), the dismissal of the indictment ordered by this Court in *United States v. Rauscher*, 119 U.S. 407 (1886), or the turnover for trial by the Belgian consul requested by the petitioner in *Wildenhus's Case*, 120 U.S. 1 (1887)—all of which this Court has recognized as necessary and enforceable consequences of our treaty obligations. *See* Part I.B.2 above. In contrast to the minimal intrusion on Texas's criminal processes, Mr. Medellín seeks recognition of his procedural rights in a case in which his life is at stake. Also at stake is the reputation of the United States as a nation committed to the rule of law, in circumstances involving its relations with one of its closest neighbors.

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[32] *See, e.g.*, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 629 (1985) (agreement to arbitrate before foreign arbitral tribunal enforced); *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 n.22, 257-61 (1981) (action dismissed in favor of foreign court under doctrine of forum non conveniens); *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 8-9 (1972) (agreement to litigate before foreign court enforced); *Ritchie v. McMullen*, 159 U.S. 235, 243 (1895) (foreign judgment enforced under *Hilton* comity rule).

[33] *See* Anne Marie Slaughter, *Court to Court*, 92 AM. J. INT'L L. 708 (1998) (discussing application of comity as between international courts and courts of the United States); Anne Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT'L L.J. 191, 194 (2003) ("If an international tribunal recognizes the importance of the national courts of the countries within its jurisdiction as enforcers of its decision, it is inviting a kind of judicial cooperation. . . .").

In rendering the *Avena* Judgment, the ICJ showed great respect for the sovereign interests of the United States and the competence of its courts. Rather than grant Mexico's request for annulment of the convictions and sentences, *see* P.A. 209a-210a, ¶¶ 31-34 (*Avena* Judgment), the ICJ held that United States courts should conduct review and reconsideration of the convictions and sentences tainted by the violations in accordance with the criteria laid down in the judgment, and then fashion relief for any prejudice. P.A. 273a, ¶ 153(9). The United States should reciprocate.

As a matter of international comity, if not legal obligation, this Court should require courts in the United States to recognize the *Avena* Judgment by undertaking the review and reconsideration of Mr. Medellín's conviction and sentence that the ICJ ordered.

B. The *LaGrand* and *Avena* Judgments Should Govern in the Interest of Uniform Treaty Interpretation.

The Court should also follow the result reached by the ICJ in the interest of uniform treaty interpretation. One of the purposes of the Vienna Convention on Consular Relations was to achieve uniformity in the law of consular relations by replacing the web of customary law and practice and bilateral conventions that had previously governed.[34] Like other parties to the Vienna Convention, the United States acceded to the Convention in order to "further friendly relations between nations through the orderly development of *uniform* standards of consular practice." S. EXEC. REP. No. 91-9, at 3 (1969) (report of Sen. Fulbright) (emphasis added).

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[34] Prior to the Vienna Convention, "[c]onsular relations ha[d] been regulated . . . mainly by bilateral agreements or other less formal arrangements and by national laws. As a result, there [had been] a wide variety of practices." *Report of the United States Delegation*, *supra*, at 41.

When a multilateral convention results from an objective to achieve uniformity in its field of coverage, "it is reasonable to impute to the parties an intent that their respective courts strive to interpret the treaty consistently." *Olympic Airways v. Husain*, 540 U.S. 644, 660-61 (2004) (Scalia, J., dissenting); *see also id.* at 655 n.9 (majority opinion) (not disputing point, but distinguishing foreign cases).[35] After all, "treaties are made, not by only one of the contracting parties, but by both," THE FEDERALIST No. 64, at 394 (John Jay) (Clinton Rossiter ed., 1961)—or, in the case of a multilateral treaty, by all. The objective of uniformity would be defeated if the national courts of each party to a treaty insisted on their own interpretation of the treaty.

The presumption in favor of uniform treaty interpretation should apply with special force here, where some 46 nations party to the Convention, including the United States and Mexico, have adopted the Optional Protocol designating a single forum for binding resolution of disputes concerning its interpretation and application. Given its consent to the ICJ's jurisdiction, the United States should treat as authoritative *any* interpretation or application of the Convention by that court. But surely it should do so when the ICJ has interpreted and applied the Convention in a case in which the United

---

[35] *See also Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 537 (1995) (looking to foreign adjudications to ensure consistent interpretation of treaty); *Air France v. Saks*, 470 U.S. 392, 404 (1985) (finding "opinions of our sister [treaty] signatories to be entitled to considerable weight"); Antonin Scalia, *Foreign Legal Authority in the Federal Courts*, 98 AM. SOC'Y INT'L L. PROC. 305, 305 (2004) ("When federal courts interpret a treaty to which the United States is a party, they should give considerable respect to the interpretation of the same treaty by the courts of other signatories. Otherwise the whole object of the treaty, which is to establish a single, agreed-upon regime governing the actions of all the signatories, will be frustrated.").

States was a party, in which it fully participated, and in which it had a full opportunity to present its views.

The ICJ itself recognized its responsibility to ensure the uniform interpretation of the Vienna Convention. In a concluding paragraph of the *Avena* Judgment, it stated that it had approached the case "from the viewpoint of the general application of the Vienna Convention" and advised that its interpretation and application of the Convention would apply in any future case between parties to the Convention. P.A. 268a-269a, ¶ 151.

There is no reason for this Court to depart from the carefully reasoned decision of the ICJ on the issues it decided in the *LaGrand* and *Avena* Judgments. This Court should instruct the Court of Appeals to follow those judgments in the interest of uniform treaty interpretation.

CONCLUSION

Petitioner respectfully requests that this Court reverse the judgment of the Court of Appeals and remand the case with instructions to issue a certificate of appealability and to apply the *Avena* Judgment as the rule of decision in his case.

Respectfully submitted,

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No. 04-5928

In The
Supreme Court of the United States

◆

JOSÉ ERNESTO MEDELLÍN,

Petitioner,

v.

DOUG DRETKE, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,

Respondent.

◆

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

◆

RESPONDENT'S BRIEF

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QUESTIONS PRESENTED

1. Is a Mexican national entitled to a Certificate of Appealability ("COA") based upon the decision of the International Court of Justice ("ICJ") in *Avena and Other Mexican Nationals (Mexico v. United States of America)*, 2004 I.C.J. 128 (Mar. 31) ("*Avena*"), when his COA request is barred under §2253(c)(2) and §2254(d) of the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA")?

2. Is a Mexican national entitled to a COA based upon the decision of the ICJ in *Avena*, when his COA request is barred under the doctrine of procedural default as interpreted by this Court in *Breard v. Greene*, 523 U.S. 371 (1998)?

3. Is a Mexican national entitled to a COA based upon the decision of the ICJ in *Avena*, when his COA request is barred by *Teague v. Lane*, 489 U.S. 288 (1989)?

4. Despite controlling federal statutory law and criminal procedure doctrines barring his entitlement to a COA, is a foreign national nonetheless entitled to such relief based upon the decisions of the ICJ in *Avena* and *LaGrand (F.R.G. v. U.S.)*, 2001 I.C.J. 466 (June 27) ("*LaGrand*"), as a matter of proposed international judicial comity and uniform treaty interpretation?

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STATEMENT OF THE CASE

On the evening of June 24, 1993, Petitioner José Ernesto Medellín and fellow members of the "Black and Whites" gang in Houston, Texas, assembled to initiate a new member, Raul Villareal. *Medellin v. State*, No. 71,997, slip op., at 2 (Tex. Crim. App. 1997); Appendix to the Petition ("P.A."), at 4a. The initiation involved Villareal's fighting each gang member for five to ten minutes, culminating in his acceptance into the gang. *Id.*

Around 11:15 p.m., fourteen-year-old Jennifer Ertman and sixteen-year-old Elizabeth Pena were returning home from visiting a girlfriend when they took a shortcut that led them near the gang members. *Id.* As they passed Medellín, he attempted to engage Elizabeth in conversation. *Id.* When she tried to run, Medellín grabbed her and threw her to the ground. *Id.* Elizabeth screamed for Jennifer to help her. *Id.* In response, Jennifer ran back to help, but she was grabbed by gang members Sean O'Brien and Peter Cantu and also thrown to the ground. *Id.*

As Medellín later confessed, what ensued was the brutal gang rape and murder of both Jennifer and Elizabeth. *Id.*, at 5a. The gang members orally, vaginally, and anally raped both of them. *Id.* When they were done, they strangled both girls to death. *Id.*, at 5a-6a.

Later that evening, Medellín and other gang members went to Cantu's house, where he lived with his brother and sister-in-law, Joe and Christina Cantu. *Id.*, at 5a. Christina asked what they had done that evening, and Medellín responded that they "had fun" and that their exploits would be seen on the television news. *Id.*

Medellín described how he had punched one of the girls because she had started screaming after he grabbed her. Medellín went on to recount gang-raping both girls and showed them his blood-soaked underwear. *Id.*

When Christina asked what had happened to the girls, Medellín told her they had both been killed so they could not identify their attackers. *Id.* Medellín explained that killing the girls would have been easier with a gun, but because they did not have one, he took off one of his shoelaces and strangled one of the girls with it. *Id.*, at 5a-6a. Medellín complained of the difficulty in killing Jennifer and Elizabeth, relating that he had to put his foot on one of their throats because she would not die. *Id.*, at 6a.

Medellín and his gang members then divided up the money and jewelry taken from Jennifer and Elizabeth. *Id.*, at 5a. Medellín's brother kept one of the girls' Mickey Mouse watch, J.A. 18, and Medellín kept a ring belonging to Jennifer – which he later gave to his girlfriend, P.A. 5a.

After hearing Medellín's grisly tale, Christina Cantu convinced her husband in the ensuing days to report the crime to the police. *Id.*, at 6a. By the time Jennifer's and Elizabeth's bodies were found, they were badly decomposed and were identifiable only through dental records. *Id.* Based on the pattern of decomposition, the medical examiner determined that each girl had suffered enormous trauma to the genital region, 32.TR.851-58, 872-75, 895, 897, 900-01,[1] and had died of trauma to the neck consistent with strangulation, P.A. 6a.

The individuals who raped and murdered Jennifer and Elizabeth were subsequently apprehended. *Id.* After reading *Miranda* warnings aloud and signing a written waiver, Medellín gave a written confession of his participation in the crime. *Id.*; J.A. 14-18. His confession detailed, *inter alia*, how the girls pleaded for their freedom prior to being murdered. J.A. 16-17.

Although born in Mexico, Medellín has lived in the United States most of his life. 35.TR.282-83. Medellín speaks, reads, and writes English, 30.TR.648; 31.TR.687; 35.TR.283, and attended American public schools since elementary school, 30.TR.648, 670; 35.TR.283, 289-90. Nevertheless, he remains a citizen of Mexico, and the local law enforcement officers failed to notify him of his right to notify his consulate. Pet'r Br., at 5.

Because Medellín was indigent, the trial court appointed counsel to represent him. 1.TR.10; J.A. 22. In the face of overwhelming evidence of guilt, counsel vigorously defended Medellín. Prior to trial, counsel filed more than 50 pleadings with the trial court, including motions demanding disclosure of the State's evidence, an effort to change venue, challenges to the constitutionality of parts of the jury charge and the capital sentencing scheme, and attempts to exclude evidence from the jury's consideration – most significantly Medellín's confession to the crime. J.A. 19-27, 29-31; 3.TR.6-185, 4.TR.3-32. At trial, counsel participated in extensive voir dire of the prospective jurors, comprising 20 volumes of trial transcript, *see* TR. volumes 6-25, during which process he struck 15 potential jurors and made two alternate strikes. J.A. 27; 4.TR.279-80. During trial, counsel vigorously challenged the State's case, particularly through cross-examination and voir dire examination of the State's principal witnesses. For example, counsel explored potential discrepancies between the testimony of key state witnesses Joe and Christina Cantu. J.A. 51; 29.TR.430-60, 480-90, 543-77, and challenged the personal knowledge of gang members Roman and Frank Sandoval, also key witnesses for the State. J.A. 51; 29.TR.269-87, 330-66. Counsel attempted to exclude important and damaging physical evidence such as crime-scene photographs and related physical items. J.A. 83-91; 28.TR.42, 61-62, 145; 29.TR.399, 468; 30.TR.586-87. During the punishment phase, counsel presented several witnesses to testify on Medellín's behalf. J.A. 58-59. Medellín's former employer, school adviser, and parents all testified as to his general character. *Id.*; 35.TR.260-93. Counsel also had a psychologist with more than 30 years of professional experience – including four years as the chief psychologist of the Texas Department of Corrections in the late 1970s – testify in an effort to avert a death sentence. J.A. 59; 35.TR.294-349.

At no point before or during the trial did Medellín or his counsel raise any claim of consular notification.

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[1] "TR" refers to the reporter's record, preceded by the volume number and followed by the page numbers.

On September 16, 1994, the jury unanimously convicted Medellín of murder during the course of a sexual assault – a capital offense. P.A. 32a. On October 11, 1994, Medellín was sentenced to death. The Texas Court of Criminal Appeals affirmed in an unpublished opinion. P.A. 1a-31a. Medellín did not petition this Court for certiorari. Instead, Medellín filed an application for writ of habeas corpus in the trial court on March 26, 1998, raising for the first time a consular notification claim. The trial court entered findings of fact and conclusions of law recommending that it be denied, P.A. 58a, and the Court of Criminal Appeals rejected Medellín's habeas application, P.A. 32a.

On November 11, 2001, Medellín filed a federal habeas petition in the United States District Court for the Southern District of Texas, which he amended on July 18, 2002, J.A. 6. The federal petition again included a claim of consular notification. The district court denied federal habeas relief and a COA on all claims. J.A. 3. Medellín's subsequent application for a COA to the Fifth Circuit was denied on May 20, 2004. J.A. 12. He petitioned this Court for certiorari, which was granted on December 10, 2004. *Medellin v. Dretke*, 125 S.Ct. 686 (2004).

SUMMARY OF ARGUMENT

This case is an appeal from the denial of a certificate of appealability from the denial of a federal habeas corpus petition. As such, it is governed by clear, objective standards of federal law. And under controlling federal law, Medellín cannot receive the relief he seeks.

Federal Law Bars Habeas Relief: Federal law poses four independent barriers to granting the writ. First, as a jurisdictional prerequisite, Medellín has failed to make a substantial showing of the denial of a constitutional right, a necessary requirement to obtaining a COA under §2253(c)(2) of the AEDPA. Absent a substantial showing of the denial of a constitutional right, the Court has no jurisdiction to consider this appeal.

Second, because the Court's precedent rejects claims identical to Medellín's, he cannot show that the state court decision was "contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States," as required by §2254(d)(1) of the AEDPA.

Third, the Court's decision in *Breard v. Greene* controls this case. Under *Breard*, Medellín procedurally defaulted his Vienna Convention claim by failing to properly raise it in state court. Because Medellín failed to assert his rights under the Vienna Convention in conformity with the laws of the United States and the State of Texas, he cannot now raise a claim of violation of such rights on federal habeas review.

And fourth, to grant Medellín the relief he seeks on federal habeas review would contravene the rule of *Teague v. Lane*, because it would be applying a new rule of law announced after his conviction became final.

***Avena* Does Not Alter Controlling Federal Law:** Medellín attempts to circumvent both the AEDPA and this Court's precedent by invoking *Avena*. The ICJ ruling in *Avena* purports to require American courts to "review and reconsider" the cases of Medellín and 50 other Mexican nationals without regard to procedural default. P.A. 195a, 247a-62a.

For at least six reasons, however, *Avena* does not alter controlling federal law, and federal law prohibits the relief Medellín seeks. First, the ICJ's *Avena* decision cannot overrule *Breard*. Only this Court can reexamine its prior holdings, informed by "a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case." *Planned Parenthood v. Casey*, 505 U.S. 833, 854 (1992). In light of the Court's test for reexamination of prior holdings under *Casey*, *Avena* provides no justification for overturning *Breard*.

Second, *Avena*, by its own terms, concerns the interpretation and application of Article 36 of the Vienna Convention, a treaty entered into before the enactment of the AEDPA. Under the "last in time" doctrine, "'an Act of Congress . . . is on a full parity with a treaty, and [] when a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null.'" *Breard*, 523 U.S., at 376 (citing *Reid v. Covert*, 354 U.S. 1, 18 (1957) (plurality opinion)). Congress's adoption of the AEDPA supersedes any right to "review and reconsideration" purportedly inuring to Medellín's benefit from the Vienna Convention.

Third, the Vienna Convention does not create individual rights. The Convention was drafted to facilitate consular relations between nations, and the text of the Convention expressly disclaims any intent "to benefit individuals." The interpretation of the United States, to which the Court gives great deference, has uniformly confirmed that textual reading; since the treaty was adopted, the Department of State has maintained that the Convention does not "'establish[ ] rights of individuals'"; indeed, "'[t]he [only] remedies for failures of consular notification under the [Vienna Convention] are diplomatic, political, or exist between states under international law.'" *United States v. Li*, 206 F.3d 56, 63 (CA1 2000) (quoting the State Department).

Fourth, the Optional Protocol, the separate treaty that gives the ICJ jurisdiction, is not "self-executing," that is, does not create rights that are independently judicially enforceable. Examination of the text of all four documents touching on the ICJ's authority – the Convention, the Optional Protocol, the U.N. Charter, and the ICJ statute – demonstrates that the only means of enforcing ICJ judgments are political or diplomatic, not judicial.

Indeed, prior to *LaGrand* and *Avena*, no court in the world had ever inferred an obligation on the part of a nation's judiciary independently to compel compliance with ICJ decisions.

Fifth, treating *Avena* as a "rule of decision" would create irreconcilable conflicts with the AEDPA, the procedural-default rule, and *Teague*. And the effect of immunizing consular-notification claims across the board from procedural default (as *Avena* purports to do) would inevitably create perverse incentives for defendants to "sandbag," deliberately declining to raise Vienna Convention claims at trial and then raising them later to secure retrials or postpone impending executions.

And sixth, treating ICJ decisions as binding rules of decision in domestic courts would pose serious constitutional problems, under both Article III and the Appointments Clause. To avoid those constitutional questions, the Court should give effect to the plain language and consistent understanding of the treaties, and conclude that ICJ decisions are not judicially enforceable in U.S. courts.

Comity and Uniform Treaty Interpretation Do Not Support the Relief Medellín Seeks: Medellín's argument that the Court should give binding effect the ICJ judgment as a matter of comity – notwithstanding the myriad legal barriers to doing so – must fail. Comity does not authorize disregarding federal statutes such as the AEDPA, and comity does not reasonably apply to foreign judgments purporting to control legal affairs within U.S. domestic borders. And – given that no country in the world gives binding judicial effect to ICJ judgments – becoming the first nation to do so would undermine, not promote, uniform treaty interpretation.

It is beyond cavil that, as Medellín puts it, America should keep her word. But the choice of how to do so, and how to respond to alleged treaty violations, is left to the political branches of government. Mexico may pursue, pursuant to the U.N. Charter, remedies at the Security Council, or it may explore diplomatic options directly with the United States. The President and Congress could seek to pass legislation addressing the *Avena* decision, or the President could sign an Executive Order creating some form of executive review. All of these options are traditional remedies for violations of state-to-state treaties. None of them requires displacing this Court's authority "to say what the law is" and to uphold federal statutes and binding rules of criminal procedure.

ARGUMENT

I. MEDELLÍN'S REQUEST FOR A CERTIFICATE OF APPEALABILITY ON HIS VIENNA CONVENTION CLAIM IS BARRED BY CONTROLLING FEDERAL LAW.

Medellín endeavors to frame this case as a contest between the United States' treaty obligations and state officials who are unwilling to yield to the demands of that treaty. But there should be no doubt: Texas fully recognizes, as it must, that the Vienna Convention is binding federal law under the Supremacy Clause.

The impediment to according legal force to the ICJ's *Avena* judgment is not resistance from the States; rather, doing so is foreclosed by the strictures of controlling federal law. And nothing in *Avena* alters that federal law.

A. The AEDPA Bars Medellín's COA Request.

1. AEDPA §2253(c)(2) bars Medellín's COA request.

a. A COA is a mandatory jurisdictional prerequisite to consideration of the merits of a habeas appeal.

Medellín challenges the Fifth Circuit's decision that he was not entitled to a COA based on his purported individual rights under the Vienna Convention. Medellín asks the Court to reverse and remand the case with instructions to issue a COA. Pet'r. Br., at 50.

Under the AEDPA, a COA must be obtained before federal courts of appeals can rule on the merits of a habeas appeal. "Until a COA has been issued federal courts of appeals *lack jurisdiction* to rule on the merits of appeals from habeas petitioners." *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (emphasis added).

"[W]hen a habeas applicant seeks permission to initiate appellate review of the dismissal of his petition, the court of appeals should limit its examination to a threshold inquiry into the underlying merit of his claims." *Id.*, at 327. "This threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claims. In fact, the statute forbids it." *Id.*, at 336. Thus, meeting the AEDPA's requirements for issuance of a COA constitutes a jurisdictional prerequisite to any reconsideration of Medellín's conviction or sentence.

b. Medellín's failure to make a substantial showing of the denial of a constitutional right bars his COA request.

In order to obtain a COA, a petitioner whose habeas petition and COA was denied by a district court must make "a substantial showing of the denial of a *constitutional* right." 28 U.S.C. §2253(c)(2) (emphasis added). The explicit reference to a "constitutional" right requires that the underlying petition for collateral relief raise a constitutional claim, not merely a claim based upon a federal statute or treaty, the other two potential bases for habeas relief. *See* 28 U.S.C. §2254(a); *Murphy v. Netherland*, 116 F.3d 97, 99-100 (CA4 1997); *Young v. United States*, 124 F.3d 794, 798-99 (CA7- 1997). This Court, in turn, has taken "due note [of Congress's] substitution" of the term "constitutional" in §2253(c)(2) for "federal," which had been the standard for a Certificate of Probable Cause prior to the AEDPA. *See Slack v. McDaniel*, 529 U.S. 473, 483 (2000). Thus, "[t]o obtain a COA under §2253(c), a habeas petitioner must make a substantial showing of the denial of a constitutional right. . . . " *Id.*, at 483-84.

A State does not deny an individual's constitutional right when it violates a treaty any more than it would violate a constitutional right were it to violate a federal statute. *See Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 259 (1829) (stating that a treaty must "be regarded in courts of justice as equivalent to an act of the legislature"). "[E]ven if the [Vienna Convention] could be said to create individual rights (as opposed to setting out the rights and obligations of signatory nations), it certainly does not create *constitutional* rights." *Murphy*, 116 F.3d at 100 (emphasis in original); *see also Waldron v. INS*, 17 F.3d 511, 518 (CA2 1993) (The Vienna Convention does not "implicate fundamental rights with constitutional . . . origins. . . . ").

"[A]lthough states may have an obligation under the Supremacy Clause to comply with the provisions of the Vienna Convention, the Supremacy Clause does not convert violations of treaty provisions . . . into violations of *constitutional* rights." *Murphy*, 116 F.3d, at 100 (emphasis in original). Were the converse true, every violation of federal statute – likewise enforced via the Supremacy Clause – could be deemed a constitutional violation.

Because Medellín cannot make a substantial showing of the violation of a *constitutional* right, his challenge to the court of appeals's denial of a COA must fail.

c. Article 36 of the Vienna Convention cannot supersede the requirements of AEDPA §2253(c)(2).

Two related principles of American law – reaffirmed in *Breard* – prevent Medellín from circumventing the controlling provisions of the AEDPA by reference to purported rights of review and reconsideration under the Vienna Convention as construed by the ICJ. In the specific context of a conflict between the Vienna Convention and the AEDPA, the Court explained,

> "[w]e have held 'that an Act of Congress . . . is on a full parity with a treaty, and that when a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null.'" *Breard*, 523 U.S., at 376 (citing *Reid*, 354 U.S. at 18).

See also The Head Money Cases, 112 U.S. 580, 598-99 (1884) (observing that treaties are subject to modification by acts of Congress); *Whitney v. Robertson*, 124 U.S. 190, 194 (1888) (noting that if a treaty and a federal statute conflict, "the one last in date will control the other").

Even assuming *arguendo* that the Vienna Convention invested Medellín with an individual right to "review and reconsideration" of criminal convictions, the subsequently-enacted provisions of the AEDPA control. Under the "last in time" rule, the AEDPA supersedes any inconsistent provisions of the Convention, *Breard*, 523 U.S., at 376, and so §2253(c)(2) bars Medellín's request for a COA.

2. AEDPA §2254(d) bars Medellín's COA request.

Even if Medellín's treaty claim could state an issue of constitutional dimension under §2253(c)(2), his request for a COA would still fail under §2254 because the federal district court correctly upheld the state court's denial of his habeas petition. The state habeas court's rejection of Medellín's claim that the Vienna Convention provided individual rights that cannot be procedurally defaulted was not contrary to clearly established federal law, and so he cannot receive a COA on this issue.

A habeas writ shall not be granted with respect to any claim that was adjudicated on the merits in state-court proceedings unless such adjudication was (1) "contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "involved an unreasonable application of . . . clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. §2254(d)(1). The "contrary to" prong of §2254(d)(1) permits a federal court to issue a writ *only* when "the state court arrives at a conclusion opposite to that reached by [the] Court on a question of law or . . . decides a case differently than [the] Court has on a set of materially indistinguishable facts." *Williams v. Taylor*, 529 U.S. 362, 413 (2000).

Medellín argues that the lower state and federal courts improperly denied his claim because the Convention creates individual rights and the procedural-default rule is superseded by *Avena*. Pet'r Br., at 33-37. But it cannot reasonably be argued that the state habeas court's rejection of these claims, P.A. 55a-56a, was contrary to clearly established federal law – indeed it flowed directly from the Court's holding in *Breard*. Therefore, §2254(d) bars Medellín's COA request.

B. The Court's Decision in *Breard* and the Procedural-Default Rule Bar Medellín's COA Request.

The Court has already addressed the precise question whether procedurally-defaulted claims of violations of consular notification under the Vienna Convention can be considered on federal habeas. They cannot. In *Breard*, the Court squarely held that the Vienna Convention is subject to the AEDPA and that claims under the Convention can be procedurally defaulted. 523 U.S., at 375-76.

The Court acknowledged in *Breard* that it could be argued that the Vienna Convention creates an individual right to consular assistance following arrest – but held that nonetheless Breard's ability to obtain relief based on violations of the Vienna Convention was subject to the subsequently enacted provisions of the AEDPA. *Id.* Under §2254(e)(2), a habeas petitioner will, as a general rule, not be afforded an evidentiary hearing if he has failed to develop the factual basis of the claim in state court proceedings. *Id.*; 28 U.S.C. §2254(e)(2). Because Breard had failed to develop the factual basis of his Vienna Convention claim in state court, the Court held that any rights conferred by the Convention were subject to §2254(e)(2) – preventing Breard from obtaining relief.

Breard applies equally here. Medellín's case squarely presents a request for a COA governed by §2253(c)(2). Medellín attempts to circumvent the AEDPA by invoking a purported right to "review and reconsideration" derived from the Vienna Convention. Yet, even if he had such a right, it would directly conflict with §2253(c)(2)'s requirement that he make a substantial showing of the violation of a *constitutional* right in order to obtain a COA. Because the AEDPA provision controls under the "last in time" rule, his claim must fail.

1. Medellín procedurally defaulted his Vienna Convention claim.

The court of appeals correctly held that Medellín's Vienna Convention claim was procedurally defaulted and

that he therefore was not entitled to a COA. P.A. 131a, 135a. The state habeas court determined, and Medellín does not contest, that he failed to object to the violation of the Vienna Convention at his trial. P.A. 46a, 79a, 131a. Under the Texas "contemporaneous objection" rule, Medellín's failure to object at trial resulted in a procedural default of his Vienna Convention claim. *State v. Mercado*, 972 S.W.2d 75, 77-78 (Tex. Crim. App. 1998); *see also Neal v. State*, 150 S.W.3d 169, 179 (Tex. Crim. App. 2004). Texas's contemporaneous objection rule has consistently been upheld as an "adequate and independent state ground that procedurally bars federal habeas review of a petitioner's claims." *Fisher v. Texas*, 169 F.3d 295, 300 (CA5 1999).

Despite his procedural default, Medellín contends that, under *Avena*, his Vienna Convention claim may be heard in federal court. In *Avena*, the ICJ determined that when the United States breaches Article 36(1), Article 36(2) precludes application of a procedural bar to prevent review and reconsideration of a sentence and conviction. P.A. 247a-49a, ¶¶112-13. According to Medellín, the ICJ's ruling is dispositive on this issue, and the procedural-default rule must be given no effect in his case.

Breard dictates a different result – specifically, that consular notification claims under the Vienna Convention are subject to procedural default. 523 U.S., at 375-76. And the court of appeals correctly applied *Breard* in its denial of a COA. P.A. 131a-32a.

Breard's reasoning is instructive. Breard argued that his claim could be heard in federal court because the Vienna Convention is the "supreme law of the land" which therefore "trumps the procedural default doctrine." 523 U.S., at 375. The Court rejected that argument – the exact argument now raised by Medellín – stating that it was "plainly incorrect." *Id.* The Court explained that state procedural doctrines may be displaced only by an express statement in the treaty itself:

> "[W]hile we should give respectful consideration to the interpretation of an international treaty

> rendered by an international court with jurisdiction to interpret such, it has been recognized in international law that, absent a *clear and express statement* to the contrary, the procedural rules of the forum State govern the implementation of the treaty in that State." *Id.* (emphasis added).

Thus, while the ICJ's judgment is entitled to "respectful consideration," it cannot be dispositive. Only an express statement, signed by the President and ratified by the Senate, could potentially supersede state procedural rules.[2]

The Court concluded that this principle is expressly incorporated into Article 36(2) of the Vienna Convention:

> "This proposition is embodied in the Vienna Convention itself, which provides that the rights expressed in the Convention 'shall be exercised in conformity with the laws and regulations of the receiving State' provided that 'said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under [Article 36] are intended.'" *Id.* (quoting Vienna Convention on Consular Relations, Apr. 24, 1963, art. 36(2), 21 U.S.T. 77, 101).

Construing the very language of Article 36(2) relied upon by Medellín, the Court determined that the Convention *does not* expressly state that the procedural rules of the forum State will not govern the treaty's implementation in that State. *Id.*, at 375-76.

Therefore, the Court applied the procedural-default rule in *Breard*. The Court noted the ordinary rule that claims not raised in state court are defaulted on federal habeas. *Id.* (citing *Wainwright v. Sykes*, 433 U.S. 72 (1977)).

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[2] *See Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 700, 704 (1988) (refusing to apply treaty as domestic law absent express treaty language); *Société Nationale Industrielle Aérospatiale v. United States Dist. Court for S. Dist. of Iowa*, 482 U.S. 522, 539-40 (1987) (refusing to construe treaty to preempt state law absent a "plain statement" of Congress's intent).

The Court then concluded that Breard's failure to raise his consular notification claim under the laws of Virginia and the United States barred him from raising a Vienna Convention claim on habeas review. *Id.*, at 375-76.

The holding in *Breard* is both directly applicable to and dispositive of Medellín's request for a COA. Because Medellín, like Breard, failed to exercise his rights under the Vienna Convention in conformity with the laws of Texas and the United States, he is not entitled to a COA.

2. Medellín cannot meet the "cause and prejudice" exception to procedural default.

A habeas petitioner who has procedurally defaulted his claims may, nonetheless, receive review of the merits, but only upon "demonstrat[ing] cause for his state-court default of any federal claim, and prejudice therefrom." *Edwards v. Carpenter*, 529 U.S. 446, 451 (2000) (quoting *Coleman v. Thompson*, 501 U.S. 722, 750 (1991)). Medellín cannot meet the "cause and prejudice" standard.

The Court has acknowledged that "[it has] not identified with precision exactly what constitutes 'cause' to excuse a procedural default." *Id.* However, "the question of cause for a procedural default does not turn on whether counsel erred. . . . Instead, we think that the existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the state's procedural rule." *Murray v. Carrier*, 477 U.S. 478, 488 (1986).

Medellín can show no reason "external to [his] defense" for his failure to object at trial.[3] Nor can he claim that ignorance of the consular-notification claims constitutes an excuse. *Id.*, at 486 ("[T]he demands of comity and finality counsel against labeling alleged unawareness of the objection as a cause for procedural default.") (quoting *Engle v. Isaac*, 456 U.S. 107, 133-34 (1982)). Whether or not Medellín knew he was waiving any claim by not objecting at trial, his failure to object cannot provide "cause" for the procedural default. *Id.* ("[T]he mere fact that counsel failed to recognize the factual or legal basis for a claim, or failed to raise the claim despite recognizing it, does not constitute cause for a procedural default."). Because no "cause" has been shown, analysis of prejudice is unnecessary and Medellín has waived his claims.

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[3] Nor does the subsequently-issued decision in *Avena* constitute an external factor sufficient to serve as cause. *Avena* did not create the consular notification obligation; the Vienna Convention did, in 1969. Thus, the entire basis for Medellín's claim was present and available long before the date of his trial.

Nonetheless, Medellín cannot show prejudice either. Like "cause," the standard for "prejudice" is less than clear, *see Barrientes v. Johnson*, 221 F.3d 741, 769 (CA5 2000) ("The Supreme Court has been reluctant to define the precise contours of the prejudice requirement.") (citing *Amadeo v. Zant*, 486 U.S. 214, 221 (1988)). Yet the Court has given some guidance, *see Strickler v. Greene*, 527 U.S. 263, 289-90 (1999) (habeas petitioner "must convince [the Court] that 'there is a reasonable probability' that the result of the trial would have been different . . . The question is not whether the defendant would more likely than not have received a different verdict . . . but whether . . . he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.").

The evidence against Medellín was overwhelming. Medellín confessed to the crimes in detail shortly after his arrest – and long before it would have been practical to require that the Mexican consulate be notified. J.A. 14-18. At trial, several witnesses testified that Medellín had described and even bragged to them on the night of the murders about his substantial involvement in the crimes. 29.TR.383-95, 405-07, 422-28; 30.TR.521-36; J.A. 51. Finally, the jury was provided physical evidence and related testimony further connecting Medellín to the crimes – including testimony that he had given a ring belonging to Jennifer Ertman to his girlfriend a few days after the crimes. 31.TR.748-52; J.A. 52. By any measure, Medellín's conviction and sentence are "worthy of confidence." *Strickler*, 527 U.S., at 290; *see also Pickney v. Cain*, 337 F.3d 542, 545 (CA5 2003) (A showing of actual prejudice is accomplished when the petitioner "demonstrates that, but for the error, he might not have been convicted."). Medellín cannot show any alleged violation that casts doubt upon the validity of his conviction or his sentence, and so, without cause and prejudice, cannot circumvent the procedural bar.

C. The *Teague* Rule Bars Medellín's COA Request.

The *Teague* rule also bars Medellín's requested relief. Under the Court's precedents, a habeas petitioner cannot enforce a "new rule" of law if the rule was announced after his conviction became final. *O'Dell v. Netherland*, 521 U.S. 151, 153 (1997) (citing *Teague v. Lane*). To obtain habeas relief, the petitioner "must demonstrate *as a threshold matter* that the court-made rule of which he seeks the benefit is not 'new.'" *Id.*, at 156 (emphasis added).

Medellín contends that *Avena* stated a new rule of decision that must be applied to his case. By necessity, Medellín asks for a new rule. To give effect to his argument, the Court would need to overrule *Breard*, a course Medellín expressly urges. Pet'r Br., at 44. Indeed, overruling prior precedent is the paradigmatic instance of a new rule.

Because Medellín's contentions would require new rules of law in relation to both the procedural-default rule and the AEDPA, his claims are barred by *Teague*.

II. UNDER THE COURT'S TEST FOR REEXAMINING PRECEDENT, *BREARD* SHOULD NOT BE OVERRULED.

A. Only This Court Has the Authority to Overrule *Breard*.

Although he is reluctant to state his position explicitly, Medellín in effect asserts that the ICJ's decision in *Avena* impliedly overturned this Court's ruling in *Breard*. Because the conflict between this Court's precedent and

Avena regarding the applicability of procedural default to Vienna Convention claims is both fundamental and irreconcilable, Medellín elides over it by simply characterizing the ICJ decision as now "binding" on this Court. He therefore requests the Court to hold that, after *Avena*, *Breard* is no longer good law. *See* Pet'r Br., at 44 (arguing that the ICJ has "definitively determined" that the procedural-default rule cannot apply).

Of course, only this Court has the power to overrule its own precedents. The principle is so fundamental that it rarely need be invoked. "Needless to say, only this Court may overrule one of its precedents." *Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533, 535 (1983); *cf. Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 225-26 (1995) (holding that Congress's reopening a final judgment unconstitutionally interfered with the power of the federal courts to decide cases, in violation of Article III and separation of powers). Accordingly, any decision to abandon *Breard* must be made by the Court under *its own* doctrines.

B. The *Casey* Factors Should Apply To Any Reconsideration of the Holding in *Breard*.

The Court has recognized that "the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable." *Casey*, 505 U.S., at 854. Thus, when the Court reexamines a prior holding, "its judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case." *Id.*

In *Casey*, the Court set forth four factors to consider when reexamining a prior holding: (1) "whether the rule has proven to be intolerable simply in defying practical workability"; (2) "whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation"; (3) "whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine"; or (4) "whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification." *Id.*, at 854-55 (citations omitted).

Under these benchmarks, *Breard* should not be overruled. And, if the Court does decide to revisit *Breard*, it should do so in accordance with the *Casey* factors. *See S. Cent. Bell Tel. Co. v. Ala.*, 526 U.S. 160, 166 (1999) (refusing to overrule a recent precedent because, under *Casey*, Respondent did "not provide a convincing reason" to do so).

C. Under *Casey*, *Breard* Should Not Be Overruled.

Application of the *Casey* factors establishes that *Breard* should not be overruled. The procedural-default rule remains an important and workable doctrine, and it is heavily relied upon throughout the country to assure efficiency, fairness, and finality in criminal proceedings. The consequences of overruling the doctrine, even for a discrete number of foreign nationals, would cause upheaval in criminal justice systems across the nation. Because the rule has not been abandoned generally – indeed it remains a vital part of the criminal process – it should not be abrogated in whole or in part.

1. The procedural-default rule protects finality of convictions and helps preserve the proper balance between federal and state authority.

The procedural-default rule is a specific application of the Court's rule that it will not review a question of federal law decided by a state court "if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment." *Coleman*, 501 U.S. at 729. Thus, when a state court refuses to consider a claim because the habeas petitioner failed to meet a state procedural requirement, an independent and adequate state-law reason supports the judgment, and the claim is procedurally barred. *Id.*; *see also Sykes*, 433 U.S., at 88-91.

The Court has also recognized that federal habeas review of a procedurally-defaulted claim in state court exacts "particularly high" costs in terms of finality, comity, and federalism. *Engle*, 456 U.S., at 128. A habeas petitioner's failure to comply with a state procedural rule deprives the state trial court of the opportunity to correct the defect and avoid the error in the first place. *Id.*

Medellín fails to articulate reasons to disregard the procedural-default rule for Vienna Convention claims, nor does *Avena* provide any other justification for overruling *Breard* under the *Casey* factors. Specifically, *Avena* fails to identify how the procedural-default rule has become "unworkable" as to Vienna Convention claims since the Court decided *Breard* in 1998. The decision gives no consideration to the costs of overruling *Breard* and abandoning the procedural-default rule in Vienna Convention cases in the United States. Finally, *Avena* does not identify any related principle of federal law that has rendered procedural default, as applied in *Breard*, "a remnant of abandoned doctrine" – or any facts unavailable to the Court at the time of its decision in *Breard* that have since robbed the procedural-default rule of significant application to Vienna Convention claims.

2. The procedural-default rule enhances reliable criminal adjudication and prevents "sandbagging."

The Court concluded in *Sykes* that the procedural-default rule was designed in part to eliminate the tactical benefit that might be derived from the stratagem of "sandbagging" by a criminal defendant. *Sykes*, 433 U.S., at 89. In rejecting the prior test of *Fay v. Noia*, 372 U.S. 391 (1963), which allowed federal habeas review for any claim absent a knowing and deliberate waiver of the claim, the Court emphasized the importance of applying the "cause" and "prejudice" standard in cases, like Medellín's, involving the application of the contemporaneous-objection rule. *Sykes*, 433 U.S., at 89. "We think that the rule of *Fay v. Noia*, broadly stated, may encourage 'sandbagging' on the part of defense lawyers, who may take their chances on a verdict of not guilty in state trial court with the intent to raise their constitutional claims in a federal habeas court if their initial gamble does not pay off." *Id.*

The incentive to tactically default a claim is enhanced by the inevitable difficulties in reassembling evidence for retrial. "[W]hen a habeas petitioner succeeds in obtaining a new trial, the 'erosion of memory' and 'dispersion of witnesses' that occur with the passage of time prejudice the government and diminish the chances of a reliable criminal adjudication." *McCleskey v. Zant*, 499 U.S. 467, 491 (1991) (citing *Kuhlmann v. Wilson*, 477 U.S. 436, 453 (1986) (plurality opinion)). Thus, sandbagging may allow a defendant to avoid critical evidence in a retrial that was instrumental in his original conviction.

But the rule under *Avena* would be even broader than the now-repudiated standard in *Fay v. Noia*. Even in the case of "deliberate bypass," *Avena* would require review on the merits. Thus, Vienna Convention claims would present particularly likely candidates for sandbagging, to the significant detriment of the judicial process. For defendants from nations that provide little help to nationals facing criminal prosecution, the upside to raising the claim is nominal. But, if the claim cannot be waived, defendants could go to verdict, hope for acquittal, and, if convicted, assert the claim and get yet another bite at the apple.

Moreover, in circumstances such as Medellín's – where there was overwhelming evidence of guilt of a capital crime – if the *Avena* rule were to prevail, a defense attorney would have to be *all but irrational* to raise a Vienna Convention claim at trial. In light of the enormous probability that, no matter what the Mexican consulate did,[4]

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[4] Throughout these proceedings, Medellín has failed to articulate even a single piece of evidence that only consular assistance could have

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Medellín would be convicted and sentenced to death, it would have made little sense to raise the claim earlier.[5] On death row, defendants have every incentive to delay, and the most rational course would be to wait until conviction and sentence, wait for years until post-conviction reviews are complete, and then – on the eve of execution – assert the claim and hope to start over from the beginning.

And the benefits from doing so could be more than delay. If Medellín obtains a new trial some eleven years after his first trial, the principal benefit to him will likely not be the assistance of the Mexican consulate, but rather the expected "erosion of memory" and "dispersion of witnesses" that occur with the passage of time. Although his confession would presumably be readmitted, it is not at all clear that the witnesses who testified against him could be located again over a decade later. And so, perhaps, even given the overwhelming evidence at his original trial, there is some possibility that the passage of time could enable a defendant such as Medellín to receive a lesser sentence or even acquittal on retrial.

These predictable effects would increase the frequency and lessen the reliability of subsequent retrials, which in turn would undermine finality of judgments and the integrity of the judicial process. As the Court observed in *McFarland v. Scott*, "[a] criminal trial is the 'main event' at which a defendant's rights are to be determined, and the Great Writ is an extraordinary remedy that should not be employed to 'relitigate state trials.'" 512 U.S. 849, 859 (1994) (citing *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983)).

Because none of the principles underlying the procedural-default rule have become obsolete, and because the rule remains both workable and of critical importance to the fair and efficient operation of criminal justice processes throughout the United States, the *Casey* factors are not satisfied. Accordingly, the Court should not overrule *Breard*.

III. *AVENA* DOES NOT SUPERSEDE FEDERAL LAW BECAUSE THE VIENNA CONVENTION DOES NOT CREATE INDIVIDUAL RIGHTS AND ICJ DECISIONS ARE NOT BINDING UPON UNITED STATES COURTS.

The Vienna Convention on Consular Relations is a 79-article, multilateral treaty negotiated in 1963 and ratified by the United States in 1969. The treaty governs "the establishment of consular relations, [and] defin[es] a consulate's functions in a receiving state." *United States v. Alvarado-Torres*, 45 F.Supp.2d 986, 988 (S.D. Cal. 1999). Article 36(1)(b) of the Convention states that the authorities of a "receiving state" shall, without delay, inform any detained foreign national of his right to have the consular post of the "sending state" notified of his detention. P.A. 137a-38a. Article 36(1)(a) provides that consular officers shall be free to communicate with nationals of the sending state, and Article 36(1)(c) gives consular officers the right to visit and correspond with the detained foreign national and to arrange for his legal representation. *Id.*

In 2003, Mexico instituted the *Avena* suit against the United States in the ICJ, alleging violations of Article 36 of the Vienna Convention in relation to Medellín and 53 other Mexican nationals convicted and sentenced in American courts. Mexico requested, *inter alia*, that all of the sentences and convictions be annulled. *See Avena*, 2004 I.C.J. 128, at ¶¶13-14; P.A. 190a-95a.

The ICJ concluded that Article 36 violations had occurred in the case of Medellín and 50 other Mexican nationals. *Id.*, at ¶¶106, 153; P.A. 243a-45a, 271a-72a. The

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provided him at trial. Given that Medellín spent most of his life in the United States, it is difficult to conceive what information or witnesses from Mexico the consulate might have provided. And, although Medellín has criticized the expert presented by his attorney in the punishment phase, he has never identified any other expert the Mexican consulate would have provided who might have been more effective.

[5] In this case, there is no indication that Medellín's counsel deliberately withheld raising a Vienna Convention claim; but, of course, the *Avena* rule was not at the time controlling, and so the incentive to do so would have been minimal.

ICJ rejected Mexico's request for annulment of the convictions and sentences and concluded that the remedy for the Article 36 violations was that the United States must provide "review and reconsideration" of both the sentences and convictions of Medellín and the other 50 Mexican nationals. *See id.*, at ¶¶14, 121-23, 153(9); P.A. 195a, 253a-54a, 274a. The ICJ further concluded that the "review and reconsideration" must take place within the judicial system of the United States, and that the doctrine of procedural default could not bar such review. *See id.*, at ¶¶111-13, 120-22, 133-34, 138-41; P.A. 247a-49a, 252a-53a, 258a-59a, 261a-62a.

Medellín maintains that federal law barring his COA is superseded by *Avena* based upon the following reasoning:

(1) the rights applied in *Avena*, which arise under the Vienna Convention, are "unquestionably self-executing" and hence judicially enforceable by individuals such as Medellín; and

(2) the Optional Protocol, the U.N. Charter, and the ICJ statute, together require U.S. courts to enforce *Avena*.

See Pet'r Br., at 13-18.

Medellín's reasoning on both points is belied by the very documents upon which he relies: the Vienna Convention, the Optional Protocol, the U.N. Charter, and the ICJ statute. Examination of each of these treaties undermines Medellín's contention that *Avena* imposes a rule of decision on U.S. courts that the Convention creates judicially enforceable individual rights. Indeed, the reading Medellín suggests is contrary to their plain text.

Medellín suggests that a self-executing treaty necessarily creates individual rights. However, that a treaty is "self-executing" in the sense that it does not require implementing legislation does not mean that it creates individual rights enforceable in American courts.

A. The Vienna Convention Does Not Create Individual Rights.

Even if Medellín's COA request were not barred under federal law, *see* Section I *supra*, his claim must fail because the Vienna Convention does not create individually enforceable rights. Medellín attempts to devise such rights by conflating the "self-execution" of a treaty with the creation of individually enforceable rights. Pet'r Br., at 32.

The term "self-executing" usually is applied to any treaty that according to its terms takes effect upon ratification and requires no separate implementing statute. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §111(4) (1987). Respondent agrees that the Vienna Convention is self-executing in the sense that no implementing legislation was required.

However, whether the terms of a treaty provide for private rights that are enforceable in domestic courts is a wholly separate question. *See id.*, at §111, cmt. h; *see also Li*, 206 F.3d, at 68 (Selya & Boudin, JJ., concurring) ("That courts sometimes discuss [self-execution in the sense of need for implementing legislation and self-execution as creating individual rights] together . . . does not detract from their distinctiveness. At bottom, the questions remain separate."). Medellín's contention that the Vienna Convention is "self-executing" in the sense that it creates individual rights enforceable in American judicial proceedings, by way of an ICJ decision or otherwise, is simply incorrect. Neither the text nor history of the Vienna Convention supports Medellín's claim that it creates such rights.

1. International agreements generally do not create enforceable individual rights.

The general rule is that "[i]nternational agreements, even those directly benefitting private persons, generally do not create private rights or provide for a private cause of action in domestic courts." RESTATEMENT (THIRD) §907, cmt. a. This rule derives from the longstanding principle that "[a] treaty is primarily a compact between independent nations," and that it "depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it." *The Head Money Cases*, 112 U.S., at 598.

Because treaty violations have traditionally been resolved by "international negotiations and reclamations," the Court has concluded that "[i]t is obvious that with all this the judicial courts have nothing to do and can give no redress." *Id.* This principle has consistently been applied by U.S. courts. *See, e.g., Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 442 (1989) (holding that the Geneva Convention on the High Seas and the Pan American Maritime Neutrality Convention, "only set forth substantive rules of conduct and state that compensation shall be paid for certain wrongs. They do not create private rights of action.").[6]

Even treaties that directly benefit private parties are not necessarily construed to create private rights or provide for a private cause of action in domestic courts. For example, in *United States v. Gengler*, 510 F.2d 62, 67 (CA2 1975), the court held that "even where a treaty provides certain benefits for nationals of a particular state – such as fishing rights – it is traditionally held that any rights arising out of such provisions are, under international law, those of the state and . . . individual rights are only derivative through states." Likewise, in *United States v. Rosenthal*, 793 F.2d 1214, 1232 (CA11 1986), the court found no merit in the defendants' argument that the actions of the United States violated its extradition treaty with Colombia because "[u]nder international law it is the contracting foreign government that has the right to complain about a violation."

A treaty can create individual rights, but only when the text of the treaty does so unambiguously. As recognized in *The Head Money Cases,* a treaty establishing particular "rights of property by descent or inheritance," gives those obligations the force of law. 112 U.S., at 598. The cases Medellín cites for the proposition that "this Court has routinely given effect to treaties conferring rights on foreign nationals," Pet'r Br., at 26, only illustrate the specific and narrow circumstances in which the Court has held that treaties provide judicially enforceable individual rights. Thus, *Kolovrat v. Oregon*, 366 U.S. 871 (1961), and *Hauenstein v. Lyndham*, 100 U.S. 483 (1879), both concern treaties expressly assuring foreign nationals' right to inherit property. Likewise, *Chirac v. Chirac's Lessee*, 15 U.S. (2 Wheat.) 259 (1817), and *Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. (7 Cranch) 603 (1812), concern the express treaty rights of foreign nationals to hold or retain property. Finally, *Asakura v. Seattle*, 265 U.S. 332 (1924), and *Cheung Sum Shee v. Nagle*, 268 U.S. 336 (1925), both involve treaties with express treaty statements that created individual rights enforceable in American courts.

2. The Vienna Convention does not require that violations of consular notification be remedied in criminal proceedings.

The Vienna Convention contains no such express statement of individual rights. It was not designed to regulate the mutual rights of individual citizens; rather, it was designed to facilitate the exercise of consular functions between contracting nations.

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[6] *See also Goldstar v. United States*, 967 F.2d 965, 968 (CA4 1992) ("International treaties are not presumed to create rights that are privately enforceable."); *United States v. Jimenez-Nava*, 243 F.3d 192, 195 (CA5 2001) ("[Treaties] do not generally create rights that are enforceable in the courts."); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 808 (CADC 1984) (Bork, J., concurring) ("Treaties of the United States, though the law of the land, do not generally create rights that are privately enforceable in courts."); *Li*, 206 F.3d, at 66 (Selya & Boudin, JJ., concurring) ("The background presumption that treaties do not create privately enforceable rights . . . [is an] extremely important principle. . . . It is surpassingly difficult to accept the idea that, in most instances, either the Executive Branch or the ratifying Senate imagined that it was empowering federal courts to involve themselves in enforcement on behalf of private parties who might be advantaged or disadvantaged by particular readings of particular treaty provisions.").

a. The text of the Vienna Convention expressly disavows individual rights that are judicially enforceable.

As in *Breard*, the Court should begin by considering the text of the Vienna Convention itself, which contains no language creating a judicially enforceable individual right for violations of Article 36. Treaty provisions are construed according to the traditional rules of statutory construction, and the Court looks first to the plain language. *United States v. Alvarez-Machain*, 504 U.S. 655, 663 (1992) ("In construing a treaty, as in construing a statute, we first look to its terms to determine its meaning.").

The Vienna Convention is based on the premise that "an international convention on consular relations, privileges and immunities would . . . contribute to the development of friendly relations among nations, irrespective of their differing constitutional and social systems." Vienna Convention, preamble. The Convention expressly provides,

> "the *purpose* of [the] privileges and immunities [discussed in the Convention] is *not to benefit individuals* but to ensure the efficient performance of functions by consular posts on behalf of their respective States." *Id.* (emphasis added).[7]

Chapter II of the Convention, in which Article 36 appears, is entitled "Facilities, Privileges and Immunities Relating to Consular Posts, Career Consular Officers and Other Members of a Consular Post." Its focus is the prerogatives of the "sending State," not individual foreign nationals. Article 36 is in Section I of Chapter II – a Section titled "Facilities, Privileges and Immunities Relating to a Consular Post." Notably, it is not found in Section II, which deals with facilities, privileges, and immunities of individuals, *i.e.*, consular officers and other "members of the consular post."

In keeping with the overall purpose of the Convention, Article 36 begins with the express statement that the provisions of paragraph (1), including the requirements of consular notification at issue in this case, are established "with a view to facilitating the exercise of consular functions relating to nationals of the sending State." Paragraph 2 of Article 36 provides that "rights referred to in paragraph 1" of the Article "shall be exercised in conformity with the laws and regulations of the receiving State," so long as those laws "enable full effect to be given" to the purpose of the rights accorded by Article 36 – those purposes being specified as "facilitating the exercise of consular functions" as described in paragraph 1. When Article 36 is violated, the aggrieved party is the sending State, because it is the sending State whose consular operations have been hindered by the violation.

Although Article 36 may provide some collateral benefits to individual foreign nationals, its overriding purpose is to facilitate the performance of consular functions by consular officials.[8] Given that the Convention's preamble expressly

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[7] The preamble to a treaty is negotiated language that generally sets forth the purpose of the contracting parties in choosing particular words to implement specific obligations. *See Olympic Airways v. Husain*, 540 U.S. 644, 660-61 (2004) (looking to the Warsaw Convention's preamble to determine the purpose of the contracting parties); *El Al Israeli Airlines v. Tsui Yuan Tseng*, 525 U.S. 155, 156-57 (1999) (same); *Alvarez-Machain*, 504 U.S., at 672-73 (relying on preamble to extradition treaty with Mexico to determine intent of contracting states).

[8] *See Li*, 206 F.3d, at 66 (Selya & Boudin, JJ., concurring):

> "It is common ground that the [Convention is an] agreement[ ] among sovereign States. Nothing in [its] text explicitly provides for judicial enforcement of [ ] consular access provisions at the behest of private litigants. Of course, there are references in the treaties to a 'right' of access, but these references are easily explainable. The contracting states are granting each other rights, and telling future detainees that they have a 'right' to communicate with their consul as a means of implementing the treaty obligations *as between*

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states that the purpose of the treaty is *not* to create individual rights, the Court should reject Medellín's invitation to discover such rights in Article 36 – which would directly contravene the negotiated meaning of the treaty.

b. The State Department has consistently construed the Convention not to create individual rights.

The plain text of the treaty disclaims individual rights. Even if there were any ambiguity, it should be resolved against finding such rights. When a treaty's terms are considered ambiguous, the Court typically relies upon nontextual sources "such as a treaty's ratification history and its subsequent operation." *United States v. Stuart*, 489 U.S. 353, 366 (1989). And here, the nontextual sources refute any individual, enforceable rights.

The United States' historic interpretation of the Vienna Convention should be accorded substantial deference. *See, e.g., El Al Israeli Airlines*, 525 U.S., at 168 ("Respect is ordinarily due the reasonable views of the Executive Branch concerning the meaning of an international treaty."); *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176. 184-85 (1982) ("Although not conclusive, the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight.").

The State Department has consistently maintained that the Vienna Convention does not create individual rights. In *United States v. Li*, the First Circuit specifically posed the question whether the Vienna Convention creates individual rights, and the State Department advised the court that the Convention is a treaty that establishes state-to-state rights and obligations, *not* individual rights. *See* 206 F.3d, at 63 (citing "Department of State Answers to the Questions Posed By the First Circuit in *United States v. Nai Fook Li*" "State Department *Li* Answers," at A-1, A-3). The State Department specifically addressed the remedies for violations of the consular notification procedures: "The [only] remedies for failures of consular notification under the [Vienna Convention] are diplomatic, political, or exist between states under international law." *Id.*

As *Li* noted, the State Department's position on the Convention may be traced to the treaty's inception. The court first pointed to a 1970 letter sent by a State Department legal adviser to the governors of the fifty States shortly after the Convention's ratification, advising that the Department did "not believe that the Vienna Convention will require significant departures from the existing practice within the United States." *Id.*, at 64. In 1989, a letter from a Department legal adviser informed a foreign national being held in an American prison that "[w]hile the U.S. authorities are required to comply with the obligations [of Article 36], failure to do so would have no effect on [his] conviction or incarceration." *Id.*

And, most relevantly, *Li* also pointed to the State Department's written submission to the Inter-American Court of Human Rights in 1998, when Mexico sought an advisory opinion on the availability of criminal remedies for failures of consular notification – the precise issue raised in this case. The Department's submission unequivocally stated that the Vienna Convention "*does not require the domestic courts of State parties to take any actions in criminal proceedings, either to give effect to its provisions or to remedy their alleged violation.*" *Id.* (emphasis added). The *Li* court thus correctly concluded that "the Department has denied the availability of criminal remedies for failures of consular notification." *Id.*

c. The ratification history of the Convention also gives no indication of an intent to provide judicially-enforceable individual rights.

Legal materials produced at the time the Convention was ratified comport with the view that it does not confer

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States. Any other way of phrasing the promise . . . would be both artificial and awkward." (emphasis in original).

rights that can be enforced in American courts. For example, a State Department legal adviser submitted written testimony on the Convention to the Senate Committee on Foreign Relations on October 7, 1969. The statement indicated that "[t]he Vienna . . . Convention does not have the effect of overcoming Federal or State laws beyond the scope long authorized in existing consular conventions." *Id.* The Department's testimony also emphasized the Vienna Convention's preamble, which states explicitly that the treaty's purpose is "not to benefit individuals." S. EXEC. DOC. E app., 91-1, at 46 (1969).

Senate Committee on Foreign Relations Chairman William J. Fulbright's report to the Senate highlighted the treaty's preamble and then listed five factors that helped secure the Committee's approval. The very first such factor was the Committee's belief that "[t]he Vienna Convention does not change or affect present U.S. laws or practice." S. EXEC. DOC. E app., 91-1, at 46 (1969). That statement of Senate intent would be incomprehensible if the treaty were in fact understood to create individual rights that could abrogate U.S. statutes and the procedural-default rule across the criminal justice system.

In short, Medellín's claim that the Vienna Convention provides him an individual right to challenge the validity of his conviction in American courts conflicts with the plain text of the treaty, the ratification history, and the subsequent State Department interpretation. International agreements, even those directly benefitting private persons, generally do not create private rights or causes of action in domestic courts. Neither the text nor the history of the Vienna Convention overcomes this presumption.

B. ICJ Decisions, Such as *Avena*, Do Not Constitute Self-Executing Federal Law.

From the proposition that the Vienna Convention is "self-executing," Medellín's syllogism goes on to assert that the Optional Protocol must be as well. But there is no basis for finding either the Optional Protocol (a separate and distinct treaty) or the specific judgments of the ICJ to be themselves self-executing in the sense that they would be judicially enforceable in domestic courts. Nor do Medellín and his *amici* provide any.

For example, after discussing at length why the Vienna Convention is self-executing (in the sense that it requires no implementing legislation), *amici* International Law Experts make the whole of their argument in one conclusory sentence, without authority: "Because *Avena* specifies what is required by the Vienna Convention itself as a remedy for breaches, all aspects of the present petition are properly understood as implementation of a self-executing treaty obligation." Int'l Law Experts Br., at 22.

Likewise, Medellín contends that the *Avena* judgment, because it interprets the Vienna Convention under the Optional Protocol, itself constitutes the "supreme Law of the Land" under the Supremacy Clause. Pet'r Br., at 38-40. However, the decisions and actions of international tribunals like the ICJ are not directly encompassed within the Supremacy Clause. ICJ rulings are not themselves "treaties," nor do they fall within the other two categories of supreme federal law – the "Constitution" and the "Laws of the United States." U.S. CONST. art. VI, cl.2. At best, decisions of the ICJ are indirectly linked to the Supremacy Clause by virtue of the underlying treaty commitments of the United States. But none of the relevant treaty commitments – the U.N. Charter, ICJ Statute, Vienna Convention, and the Optional Protocol – convert the decisions of the ICJ into self-executing federal law. Therefore, *Avena* standing alone cannot create any individually enforceable right in American judicial proceedings.

1. The scope of the ICJ's jurisdiction is limited to disputes between consenting nations, and its decisions are enforceable only by the Security Counsel.

The U.N. Charter and the ICJ's statute together delineate the scope of the ICJ's authority. The ICJ can hear only disputes between nations, STATUTE OF THE INTERNATIONAL COURT OF JUSTICE art. 34, ¶1, 59 Stat.

1055 (1945), and then only when those nations have consented to the ICJ's jurisdiction, Vienna Convention, art. 36.[9] ICJ decisions have binding force only between the parties, which must be sovereign nations, and only with respect to the particular dispute, *id.* art. 59. Indeed, the ICJ statute specifies that, in all other instances, decisions of the court have "no binding force." *Id.*

As a result, the ICJ cannot declare individual rights, and its decisions have no *res judicata* effect on disputes between individual persons. *See, e.g., Socobel v. the Greek State*, 30 Avril 1950, 18 I.L.R. 3. ICJ judgments are "final and without appeal," but there is no rule regarding the application of those decisions before other tribunals. ICJ STATUTE art. 60.

Nor does the ICJ have direct enforcement powers. Instead, the Security Council enforces ICJ judgments in its discretion. Article 94 of the U.N. Charter provides:

> "1. Each Member of the United Nations undertakes to comply with the decision of the [ICJ] in any case to which it is a party.
>
> 2. If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, *if it deems necessary*, make recommendations or decide upon measures to be taken to give effect to the judgment." U.N. CHARTER art. 94 (emphasis added).

Thus, while there exists in principle an obligation to respect the ICJ's judgments, ultimate enforcement power is given not to the ICJ – which in effect has authority merely to make declarations that include the scope of damages resulting from a breach of international law – but to the Security Council which exercises the political and institutional authority to enforce the ICJ's decisions.

Significantly, no nation has ever inferred from Article 94(1) an obligation to enforce ICJ decisions as domestic law.[10] Indeed, this interpretation of the enforceability of the ICJ's decisions in U.S. courts was expressly rejected by the D.C. Circuit in *Comm. of United States Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 938 (CADC 1988) (Mikva, J.) (quoting *Diggs v. Richardson*, 555 F.2d 848, 851 (CADC 1976)): "[T]he words of Article 94 'do not by their terms confer rights upon individual citizens; they call upon governments to take certain action.'"

The ICJ's statute confirms that *Avena* does not create rights judicially enforceable by Medellín. The ICJ's decisions have binding force *only* between the parties and with respect to their particular case. *See* ICJ STATUTE art. 59. Only nations may be parties in cases before the ICJ, *id.*, at art. 34, para. 1. Neither Medellín nor Respondent Dretke were parties to *Avena*. Therefore, although Medellín's case is discussed in *Avena*, the ICJ statute precludes *Avena* from creating any binding obligation as between Medellín and the United States or between Medellín and Respondent. *See Comm. of United States Citizens Living in Nicaragua*, 859 F.2d, at 938 (Articles 92 and 94 of the U.N. Charter "make clear that the purpose of establishing the ICJ was to resolve disputes between national governments. We find in these clauses no intent to vest citizens who reside in a U.N. member nation with authority to enforce an ICJ decision against their own government."); *see also Socobel*, 18 I.L.R. 3 (ICJ judgments cannot have *res judicata* effect in domestic courts because there is no identity of parties); *In re Investigation of World Arrangements with Relation to the Production, Transportation, Refining and Distribution of Petroleum*, 13 F.R.D. 280, 290-91 (D.D.C. 1952) (refusing to give controlling effect to ICJ ruling).[11]

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[9] U.N. members have the option of submitting to the Court's full "compulsory jurisdiction" under article 36(2), or subject to specific reservations under article 36(3). Otherwise, jurisdiction can be by special agreement or by treaty under article 36(1).

[10] Although many foreign cases are unreported, the only case Respondent's research has uncovered where a domestic court applied an ICJ decision was in French-controlled Morocco (a legal entity no longer extant). *See Administration des Habous v. Deal*, 19 I.L.R. 342 (Morocco, Ct. App. Rabat. 1952) – a decision later rejected by a tribunal in French-controlled Tunisia, *see Mackay Radio & Tel. Co. v. Lal-la Fatma Bent si Moahamed el Khadar et al.*, 21 I.L.R. 136 (Tangier, Ct. App. Int'l Trib. 1954).

2. Although the Optional Protocol confers jurisdiction, it does not convert the ICJ's decisions into self-executing federal law.

Medellín's reliance on the Optional Protocol as a basis for compelling domestic judicial enforcement of *Avena* is misplaced. The Optional Protocol, a separate and distinct international instrument from the Convention, provides,

> "[d]isputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the [ICJ] and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol." OPTIONAL PROTOCOL TO THE VIENNA CONVENTION ON CONSULAR RELATIONS CONCERNING THE COMPULSORY SETTLEMENT OF DISPUTES, Apr. 24, 1963, 21 U.S.T. 77 (138a).

Medellín argues, in effect, that the ICJ's jurisdiction to interpret and apply the Vienna Convention under the Optional Protocol must include the authority to compel domestic courts of member nations to enforce its decisions. Neither the language, legislative history, nor the application of the Optional Protocol support this contention.

First, the text of the Protocol contains no language indicating that ICJ decisions are enforceable in the domestic courts of member nations. Such an interpretation would contravene the plain directive of the U.N. Charter that it is the Security Council, not the domestic courts of member states, that has discretion to enforce ICJ decisions. U.N. CHARTER art. 94.

Second, the limited ratification history concerning this aspect of the Optional Protocol is inconsistent with Medellín's position. Indeed, a representative of the State Department explained in testimony before the Senate, "[i]f problems should arise regarding the interpretation or application of the [Vienna Convention], such problems would probably be resolved through *diplomatic* channels." Vienna Convention on Consular Relations, S. EXEC. REP. No. 91-9, at 19 (1969) (statement of J. Edward Lyerly, Deputy Legal Adviser for Administration) (emphasis added). Mr. Lyerly further observed that "parties to the optional protocol may agree to resort to . . . an arbitral tribunal" or conciliation. *Id.* And the State Department made clear that nothing related to the Convention was intended in any way to change U.S. laws or practice. *See* S. EXEC. DOC. E, 91-1, at V.

Finally, applying *Avena* as a "rule of decision" would require the Court to accept Medellín's implicit contention that the ICJ has the authority to overrule this Court's precedent and create federal law. There is no evidence that any other state party regards ICJ decisions under the Optional Protocol as controlling over contrary decisions of their highest domestic courts, or that the Optional Protocol even purports to create self-executing domestic law.

3. Treating *Avena* as a "rule of decision" would create untenable conflicts with the AEDPA and established doctrines of criminal procedure.

Avena purports to require judicial review and reconsideration, regardless of any procedural bars under United States law, not only of Medellín's case and those of 50 other Mexican nationals, but also of any other "foreign nationals finding themselves in similar situations in the United States." P.A. 261a-64a, 268a-69a.[12] Thus, the "rule of decision" that Medellín contends must be derived from *Avena* would on its face require judicial "review and reconsideration" of – at a minimum – every death penalty case in the United States in which violations of the Vienna Convention may have occurred, and would possibly extend even further to the many thousands of foreign nationals incarcerated for other crimes. And, each review would, under *Avena*, be irrespective of any procedural bars and, under Medellín's theory, the AEDPA.

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[11] *See also Flores v. S. Peru Copper Corp.*, 343 F.3d 140, 157 n.24 (CA2 2003) ("[A]lthough the Charter of the United Nations has been ratified by the United States, it is not self-executing."); *Spiess v. C. Itoh & Co. (Am.)*, 643 F.2d 353, 363 (CA5 1981); *People of Saipan v. United States Dep't of Interior*, 502 F.2d 90, 100 (CA9 1974) (Trask, J., concurring).

Because *Avena* is, by its terms, so expansive, its acceptance as a "rule of decision" binding on U.S. courts would necessarily create significant conflicts with, at a minimum, several provisions of the AEDPA, as well as longstanding doctrines of criminal procedure. For example, the proposed "rule of decision" conflicts with the AEDPA's statute of limitations for habeas claims as applicable to at least one of the 51 Mexican nationals whose cases were considered in *Avena*. Under 28 U.S.C. §2244(d)(1), "[a] 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court." Cesar Robert Fierro Reyna, whose case was considered in *Avena*, has already been barred from any further review of his case by the controlling statute of limitation provisions of §2244(d)(1). *Fierro v. Cockrell*, 294 F.3d 674 (CA5 2002), *cert. denied*, 538 U.S. 947 (2003). Nonetheless, *Avena* purports to require that Fierro's case be reviewed and reconsidered by U.S. courts based upon its interpretation of the Vienna Convention. P.A. 196a-98a, 243a-45a, 271a-73a.

Other provisions of the AEDPA would likely be affected as well. Such conflicts are virtually inevitable because *Avena* specifies that it applies broadly to any foreign nationals "in similar situations." P.A. 269a. For example, as in *Breard*, any number of cases purportedly subject to the *Avena* "rule of decision" may involve inmates who have failed to develop the factual basis of their Vienna Convention claim in state court. *See Breard*, 523 U.S., at 376. The Court held, "Breard's ability to obtain relief based on violations of the Vienna Convention *is subject to this subsequently enacted rule* [the AEDPA], *just as any claim arising under the United States Constitution would be.*" *Id.* (emphasis added); 28 U.S.C. §2254(a), (e)(2). Accepting Medellín's contention that *Avena* constitutes a binding rule of decision on American courts would thus likely conflict with §2254 in any case, like *Breard*, where the foreign national has failed to develop the factual basis of his claim in state court.

In addition to invalidating the application of the AEDPA, Medellín's suggestion that the Court should recognize *Avena* as a binding rule of decision would also abrogate well-established doctrines of criminal procedure. As discussed in Section I, *supra*, the application of *Avena* as a rule of decision requires overruling *Breard* and ignoring *Teague* for any foreign national "similarly situated" to Medellín or any of the other 50 Mexican nationals in *Avena*. *See* P.A. 268a-69a.

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[12] Disregarding the narrow confines of its jurisdictional statute, the ICJ emphasized the purported breadth of its decision:

> "The Court would now re-emphasize a point of importance. . . . To avoid any ambiguity, it should be made clear that, while what the Court has stated concerns the Mexican nationals whose cases have been brought before it by Mexico, the Court has been addressing issues of principle raised in the course of the present proceedings from the viewpoint of the general application of the Vienna Convention, and there can be no question of making an *a contrario* argument in respect of any of the Court's findings in the present Judgment. *In other words, the fact that in this case the Court's ruling has concerned only Mexican nationals cannot be taken to imply that the conclusions reached by it in the present Judgment do not apply to other foreign nationals finding themselves in similar situations in the United States.*" P.A. 268a-69a. (emphasis added).

Given that the AEDPA, procedural default, and *Teague* all apply to *constitutional* claims, it would be passing strange to accede to Medellín's suggestion that, under *Avena*, claims under the Vienna Convention – which is on par with statutes, and which Medellín's *amici* analogize to *Miranda* warnings, Int'l Law Experts Br., at 8 – should somehow be uniquely exempt from the ordinary strictures of criminal law.

4. The Court should not defer to the ICJ based upon any presumption that it has expertise in treaty interpretation.

Medellín's argument concerning the effect of *Avena* can be bifurcated into two aspects: an expansive version, and a weak version. The first, to which he devotes the vast majority of his efforts, is that *Avena* constitutes a binding "rule of decision" enforceable in U.S. courts. The second, to which he and his *amici* allude elliptically, is that even if *Avena* is not binding, it should be accorded deference as a determination of the expert body charged with interpreting the Convention – a notion somewhat akin to *Chevron* deference. *See Chevron, U.S.A. v. Nat. Res. Defense Council*, 467 U.S. 837 (1984). Neither theory is availing.

As an initial matter, because a treaty is federal law, this Court has full competence to construe it according to its terms – and need not look to a foreign tribunal for guidance. *See, e.g., El Al Israeli Airlines*, 525 U.S., at 167-68 (construing rule of decision provided in Warsaw Convention); *cf. Hagen v. Utah*, 510 U.S. 399, 422-23 & n.1 (1994).

Additionally, while the ICJ's work often concerns treaties, it is tied to no political decision-making process – and to none of the accompanying political responsibilities – that would ensure that these "experts" had been given legitimate authority to impose their conclusions. *See Sosa v. Alvarez-Machain*, 124 S.Ct. 2739, 2761 (2004) (the Court's authority to recognize legal standards arising in international law is limited to objectively established standards because the Court otherwise has no authority to adopt policy); *cf. id.*, at 2771-72 (Scalia, J. dissenting) (arguing that this standard is too lenient because it still gives courts authority to create law).

And, as with *Chevron* review, deference is unwarranted where the proffered interpretation conflicts with the plain text. Here, the ICJ disregarded the express text of the Convention that it creates no individual rights, and did not even purport to reconcile its far-reaching interpretation with conflicting domestic law, instead simply sweeping the latter aside. Its judgment should be given due respect, but that decision should not control this Court's independent assessment of binding U.S. law.

C. Fulfilling Treaty Obligations Under Article 36 Is the Task of the Political Branches.

1. The implementation of the Vienna Convention is outside the appropriate scope of judicial review.

As the Court has long recognized,

> "the very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities, nor responsibility and long have been held to belong in the domain of political power not subject to judicial intrusion or inquiry." *Chicago & Southern Airlines v. Waterman SS Corp.*, 333 U.S. 103, 111-12 (1948).

Because the specific remedy Medellín seeks – the imposition of "review and reconsideration" of his conviction despite controlling state law and the AEDPA – appears to be judicial, Medellín argues that it should be implemented by the judiciary without regard to the political branches. Medellín ignores the fact that the Convention is an agreement between nations, not a statutory enactment benefitting individuals. A country considering itself harmed by congressional enactment following a treaty may "present its complaint to the executive head of the government. . . . The courts can afford no redress. Whether the complaining nation has just cause of complaint, or our country was justified in its legislation, are not matters for judicial cognizance." *Whitney*, 124 U.S., at 194.

Nor is the judiciary well suited to determine how the United States should act under a treaty, because the United States has discretion to disregard treaty obligations: the President has the power to waive treaties, *Charlton v. Kelly*, 229 U.S. 447, 475-76 (1913), and Congress may enact inconsistent legislation, *Whitney*, 124 U.S., at 194. Moreover, the Executive branch is best-suited to foresee the implications of its actions regarding treaties because the State Department maintains diplomatic contacts throughout the world. The choice of the best manner in which to fulfill a treaty – or, in the alternative, whether to negotiate for a lesser obligation or even to withdraw from an obligation entirely – is by necessity "delicate" and "complex." As a prudential matter, the courts should not interfere in the process.

2. To hold that the political branches could have vested the ICJ with power to determine both state and federal law would raise serious constitutional concerns.

"The Judicial Power of the United States, shall be vested in one supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish." U.S. CONST. art. III, §1. As Justice O'Connor has explained,

> "the vesting of certain adjudicatory authority in international tribunals presents a very significant constitutional question in the United States. Article III of our Constitution reserves to federal courts the power to decide cases and controversies, and the U.S. Congress may not delegate to another tribunal 'the essential attributes of judicial power.'" *Federalism of Free Nations*, 28 N.Y.U. J. INT'L L. & POL. 35, 42 (1996) (citing *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 851 (1986)).

Accepting Medellín's argument that the treaty obligations of the United States have, in effect, vested in the ICJ the power to create federal law would raise precisely those fundamental separation-of-powers questions.

Post-*Breard*, the only new development that Medellín can point to is that another body, the ICJ, has given its interpretation of a federal treaty. If that interpretation supersedes this Court's – especially in a criminal case or controversy such as the instant proceeding – then necessarily the ICJ would be exercising judicial power.

The most fundamental component of the "judicial Power" discussed by the Constitution is the duty to be the final arbiter of the interpretation of federal law. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."). Under Medellín's interpretation, as a result of signing the Vienna Convention, "[t]he judicial Power of the United States" has been, at least in some instances, placed not in "one supreme Court," as the Constitution requires, but instead divided between this Court and the ICJ. But whether acting alone or in concert, neither the President nor the U.S. Congress can accomplish such a result. Such a fundamental shift in the vesting of American judicial power cannot be accomplished without constitutional amendment.

Indeed, this prohibition has its roots in *Hayburn's Case*, 2 Dall. 409 (1792), "which stands for the principle that Congress cannot vest review of the decisions of Article III courts in officials of the Executive Branch." *Plaut*, 514 U.S., at 218. Given the exacting scrutiny that this Court has focused upon *domestic* non-Article III tribunals assuming judicial power, it is difficult to understand how *foreign* non-Article III tribunals could stand in any better stead.

Nothing in the President's foreign-affairs and treaty power allows a reordering of the judicial functions of the Article III courts that would otherwise be barred by the Constitution. "[A] treaty cannot change the Constitution or be held valid if it is in violation of that instrument. This results from the nature of and fundamental principles of our government." *The Cherokee Tobacco*, 78 U.S. 616, 620-21 (1870); *see also Reid*, 354 U.S. at 17 ("The prohibitions of the Constitution were designed to apply to all branches of the National Government and they cannot be nullified by the Executive or by the Executive and the Senate combined."); *Boos v. Barry*, 485 U.S. 312, 324 (1988) ("[N]o agreement with a foreign nation can confer power on the congress, or on any other branch of Government, which is free from the restraints of the constitution.").[13]

To allow a delegation or usurpation of the judicial power would inevitably lead to "the encroachment or aggrandizement of one branch at the expense of the other." *Schor,* 478 U.S., at 850-51 (quoting *Thomas v. Union Carbide Agric. Prod.*, 473 U.S. 568, 582-83 (1985), and *Buckley v. Valeo*, 424 U.S., at 122).

Accepting Medellín's interpretation of the authority of the ICJ would also raise serious concerns under the Appointment's Clause. U.S. CONST. art. II, §2, cl.2.[14]

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[13] In *Dames & Moore v. Regan*, the Court approved of the Iran-American Claims Tribunal, but only because arbitrating all claims regarding the Iranian revolution was a significant part of the "bargaining chip" with which the President was able to unravel the underlying diplomatic dispute. 453 U.S. 654, 673 (1981). And there, if the legal principles applied by the arbitral panel – as opposed to the monetary awards confirmed – would control in U.S. courts, it, too, would have violated Article III.

[14] The Appointments Clause provides, "[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme court, and all other Officers of the United States, whose appointments are not herein otherwise provided for . . . but the Congress may by Law vest the Appointment of such

(Continued on following page)

A fundamental part of the Constitution's separation of powers, the Appointments Clause protects the President's Article II prerogatives, and is intended to ensure that "any appointee exercising significant authority pursuant to the laws of the United States" will be selected by the President and, where necessary, confirmed by the Senate. *Buckley*, 424 U.S., at 126. Under Medellín's interpretation, the members of the ICJ will be permitted to wield significant, indeed with respect to the Convention, supreme, authority concerning the laws of the United States, without ever having been chosen by the President as required by the Appointment's Clause.[15] Nor will they have been confirmed by the Senate, as would be required to wield the "judicial Power" of the United States that is vested with the "Judges of the supreme court." U.S. CONST. art. III & II, §2, cl.2.[16]

Settled principles of treaty construction obligate the Court to avoid the constitutional conflict that would be occasioned by Medellín's proposed interpretation.[17] "Federal statutes are to be so construed so as to avoid serious

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inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."

[15] Although the U.S. has always had a representative on the ICJ, ICJ judges are elected by a majority vote of the Security Council and General Assembly, *see* ICJ STATUTE arts. 3, 4, 8, 10, after nomination following consultation with the "highest court of justice" and the nation's law schools, *id.* art. 6.

[16] This concern is heightened by the potentially political nature of ICJ review. *See La Grand* (Separate Opinion of Vice President Shi, ¶17) (recognizing that the judgment is erroneous, but voting for review and reconsideration because the death penalty is of a "severe" and "irreversible nature"); *id.* (Separate Opinion of Judge Oda, ¶9) ("I would hazard a guess that the German Government was prompted to bring this case . . . by the emotional reaction on the part of some people there – where the death penalty has been abolished – to a case involving the existence and application of the death penalty in the United States.").

[17] *See* A. Mark Weisburd, *Problems with the Concept of "Vertical Conflicts,"* 96 AM. SOC'Y INT'L L. PROC. 42, 43-44 (2002); Curtis A. Bradley, *International Delegations, the Structural Constitution, and Non-Self-Execution*, 55 STAN. L. REV. 1557, 1570-72 (2003).

doubt of their constitutionality." *Machinists v. Street*, 367 U.S. 740, 749 (1961). The same canon of constitutional avoidance has always applied to treaties as well. *See Murray v. the Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804). Thus, if it is "fairly possible" to construe a statute or treaty without contravening the Constitution, the Court should do so. *Schor*, 478 U.S., at 841.

Because of their express language, the international instruments on which Medellín relies can be fairly construed not to raise a constitutional issue. The Vienna Convention creates an obligation on the United States to offer consular notification. The United States's failure to comply is an issue for the political branches to address, either directly with a foreign nation or under Article 94 of the U.N. Charter through the political process.

D. Medellín Has Other Avenues to Seek Remedies for Article 36 Violations.

A decision by this Court rejecting Medellín's request for a COA would not eliminate all recourse regarding his case or those of the other Mexican nationals discussed in *Avena*. As the State Department has explained, "[t]he remedies for failures of consular notification under the Vienna Convention are diplomatic, political, or exist between states under international law. *See* State Department *Li* Answers, at A-1, A-3. There are at least four alternative methods of seeking enforcement of *Avena* which do not improperly create individual rights under the Vienna Convention or expand the ICJ's authority at the expense of U.S. sovereignty. First, Mexico, the actual party to *Avena*, could work with the U.N. Security Council, as contemplated by Article 94, to apply *Avena*. Second, Mexico could pursue direct diplomatic initiatives with the United States to implement *Avena*. The third and fourth options, also most likely achieved through Mexico-U.S. diplomacy, would be the enactment of appropriate legislation addressing *Avena* or, alternatively, an Executive Order to achieve the same goals.

Because the U.N. Security Council is specifically tasked with enforcing, at its discretion, ICJ decisions, U.N. CHARTER art. 94(2), that is the most direct avenue for Mexico to seek implementation of *Avena*.

The avenue of diplomacy is also appropriate. The President is under a constitutional duty to "take Care that the Laws be faithfully executed." U.S. CONST. art. II, §3. As a duly ratified treaty, the Vienna Convention is undoubtedly the "supreme Law of the Land." U.S. CONST. art. VI, cl.2. As the executive of the national government, the President enjoys preeminence in conducting the foreign relations of the United States. *See, e.g., Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003). Accordingly, working with Mexico and within the Executive Branch to implement *Avena* and enhance compliance with Article 36 is well within the duties and responsibilities of the President. Alternatively, diplomatic initiatives between the United States and Mexico could lead to the enactment of appropriate legislation by Congress implementing *Avena*.

IV. THE ICJ'S DECISIONS IN *LAGRAND* AND *AVENA* ARE NOT ENFORCEABLE UNDER COMITY AND ARE INCONSISTENT WITH UNIFORM TREATY INTERPRETATION.

Medellín alternatively asks that, because the ICJ is an international court, the Court defer out of "comity." But comity is not automatically extended to foreign tribunals *qua* tribunals; instead, it is a voluntary observance of the right of foreign nations to regulate their own affairs. *See Hilton v. Guyot*, 159 U.S. 113, 166 (1895). Applying comity is "a recognition which one nation extends within its own territory to the legislative, executive, or judicial acts of another." *Somportex Ltd. v. Philadephia Chewing Gum Corp.*, 453 F.2d 435, 440 (CA3 1971). Medellín's comity argument fails for three reasons.

First, a plea to "comity" is not enough to empower the Court to set aside the requirements of the AEDPA. Unless unconstitutional or modified by subsequent statute, the AEDPA provides the governing standard for habeas review, which the Court is obliged to apply.

Second, comity applies to the ability of foreign tribunals to regulate legal affairs within foreign nations. *Avena* does not purport to do so; instead, it expressly reaches across U.S. national borders and applies exclusively within the United States. Because the ICJ was not interpreting an application of foreign law to foreign citizens in a foreign jurisdiction – the basic predicate for comity – there is no basis for the Court to defer to the ICJ's judgment about U.S. treaty law.

And third, comity is particularly inappropriate with respect to *Avena* and *LaGrand*, since both decisions swept aside U.S. statutory provisions and this Court's binding precedents. A fundamental tenet of comity is that it be reciprocal, and the *Avena* and *LaGrand* judgments reflect little respect on the ICJ's part for U.S. law.

Finally, Medellín asserts that *Avena* "should govern in the interest of uniform treaty interpretation." Pet'r Br., at 48. But applying *Avena* would frustrate, not further, uniform treaty interpretation, for two reasons.

First, at the time *LaGrand* was decided in 2001, according to the State Department, no country in the world had interpreted the Vienna Convention to create individual rights or ordered reconsideration of a criminal conviction based on a violation of Article 36.[18] Thus, *LaGrand* itself rejected the prevailing, uniform interpretation of the Convention, for the first time finding in the text of the Convention an individual right that no member nation had understood to exist – and then further discovering that such right was enforceable in the domestic courts of a member nation.

Second, there is no indication that international practice regarding the Convention has changed since *LaGrand* and *Avena*. At least two courts have refused to apply the *LaGrand* decision as a basis for revisiting a conviction – including a court in Germany itself, the party that brought *LaGrand* in the first place. *See* BGH 5 StR 116/0 decided on 7 Nov. 2001, *available at* http://www.bundesgerichtshof.de (Germany); *see also R. v. Partak*, [2–1] 160 C.C.C. (3d) 553, 570 (Canada).[19]

Thus, Medellín asks the Court (1) to diverge from the international consensus that the Convention provides no individual rights, and (2) to become the first court in the world to accord binding authority to an ICJ judgment in domestic tribunals. Doing so would not advance uniform treaty interpretation; instead, it would undermine, and potentially unravel, uniformity.

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[18] After a comprehensive investigation into international practice, the State Department "found no indication that other states party have remedied such failures by granting remedies in the context of their criminal justice proceedings." State Department *Li.* Answers at A-8, A-9 (commenting that no party had produced a single example of a nation providing a judicial remedy for Article 36 violations); *see also Avena*, Counter-Memorial of the United States, at 288-90 (Mexico failed to provide a single example of a state practice of reconsidering convictions based on consular-notification); *Canada v. VanBergen*, 261 A.R. 387, 390 (2000) (rejecting legal challenge to extradition from Canada based on Article 36); *R. v. Abbrederis*, [1981] 36 A.L.R. 109, 122-23; *Re Yater*, "Judicial Decisions," 1976 Ital. Y.B. Int'l Law, at 336-39, Vol. II (decided by Italy's Court of Cassation Feb. 19, 1973).

[19] In fact, even Mexico's litigation posture in *Avena* was a reversal of its traditional position on the subject. The 1976 Treaty on the Execution of Penal Sentences, Nov. 25, 1976, Mex.- U.S., 28 U.S.T. 739, at Mexico's explicit insistence, provides for enforcement of Mexican convictions with no mention of Mexico's article 36 violations. Mexico, in recognizing its own poor record in complying with article 36, stated that "we cannot . . . expect that irregularities will not occasionally be committed." Letter from Alfonso Garcia Robles, Foreign Minister of Mexico, to Henry A. Kissinger, Secretary of State of the United States of America (Mar. 25, 1976). Mexico's federal law governing consular-notification provides no judicial remedy for individuals, only a consular-notification requirement. LEYES Y CODIGOS DE MEXICO, C.F.P.P., art. 128.IV (1995) ("Si se tratare de un extranjero, la detencion se comunicara de inmediato a la representacion diplomatica o consular que corresponda." ("In the case of an alien, the fact that he has been placed in custody shall be reported immediately to the appropriate diplomatic or consular mission.")).

CONCLUSION

The Court should affirm the judgment of the court of appeals.

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IN THE

Supreme Court of the United States

JOSÉ ERNESTO MEDELLÍN,

Petitioner,

—v.—

DOUG DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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ARGUMENT

Petitioner came to this Court seeking enforcement of the *Avena* Judgment as the rule of decision in his case. Exercising his foreign affairs authority, the President of the United States has now determined that the *Avena* Judgment should be given effect in state courts. *See* U.S. Br. App. 2. Specifically, the President has determined that "expeditious compliance" with the Judgment is in the "paramount interest" of the United States. U.S. Br. 41-42.

The President's determination provides Petitioner an independent right to enforce the *Avena* Judgment. *See* U.S. Br. Part IV. At the same time, by removing any conceivable doubt about the appropriateness of judicial enforcement of the *Avena* Judgment, the President's determination confirms Petitioner's right to relief, as a matter of the direct effect of the *Avena* Judgment under the Supremacy Clause, and hence also confirms the error of the judgment this Court has under review. After the President's determination, it should be the task of this Court, and any other court addressing a claim by one of the Mexican nationals subject to the *Avena* Judgment, to ensure that they receive the review and reconsideration to which the International Court of Justice ruled, and the President has now confirmed, they are entitled. *See* Part I below.

On the questions on which this Court granted the Petition, Respondent contests remarkably little of Petitioner's case. *First*, Petitioner argued that the Vienna Convention on Consular Relations, as interpreted and applied by the ICJ in the *Avena* Judgment, is a binding international legal obligation of the United States and requires the United States to provide review and reconsideration of his conviction without regard to procedural default rules. Respondent agrees, as does the United States. *See* Part II.A.1 below.

Second, Petitioner argued that the Vienna Convention is self-executing in the sense that it is effective without implementing legislation. Respondent agrees, as does the United States. *See* Part II.A.2 below.

Third, Petitioner argued that the Vienna Convention, as interpreted and applied in the *Avena* Judgment, provides individual rights. Respondent argues for a different interpretation of the Convention. He does not contest, however, that the ICJ, in a judgment binding on the United States, interpreted the Convention to provide individual rights, an interpretation that is well grounded in its text. *See* Part II.A.3 below.

Fourth, Petitioner argued that the federal habeas corpus statute, specifically 28 U.S.C. §§ 2241(c)(3) and 2254(a), provides an express private cause of action to individuals held in custody in violation of a treaty. Respondent ignores this point, and instead argues the irrelevant point that the treaty itself does not create a private cause of action. Like most treaties, however, the Vienna Convention allows each country to comply by the means specified by its own laws, subject, in the case of the Vienna Convention, to the proviso in Article 36(2) that those procedures be adequate to give full effect to the rights created by the Convention. In the United States, treaty rights are enforceable in habeas corpus. *See* Part II.A.4 below.

The various other arguments that Respondent raises as to why the Court should disregard the treaty obligations of the United States are without merit, *see* Part II.B below, as are the assorted procedural arguments that Respondent belatedly inserts in an attempt to prevent this Court from reaching the merits of the questions presented, *see* Part III below.

In deference to the President's authority, Petitioner has asked that this Court stay its proceedings while Petitioner pursues enforcement in the Texas courts of his rights under the *Avena* Judgment and the President's determination. Should the Court go forward with the case at this time, however, it should answer the questions presented in Petitioner's favor.

I.

THE PRESIDENT'S DETERMINATION COMPELS JUDICIAL ENFORCEMENT OF THE *AVENA* JUDGMENT.

On February 28, 2005, the President confirmed that the United States has an international obligation to comply with the *Avena* Judgment and determined that, as a means of compliance, state courts should provide the review and reconsideration mandated by the *Avena* judgment. U.S. Br. Part IV & App. 2. The President's action removes any possible objection that judicial review and reconsideration of Mr. Medellín's conviction and sentence would trench on the Executive's conduct of foreign affairs or that extending comity to the *Avena* Judgment would offend the public policy of the United States.

As the United States explains, the President "has determined that the foreign policy interests of the United States in meeting its international obligations and protecting Americans abroad require the ICJ's decision to be enforced…." U.S. Br. at 48. He therefore exercised his well-established foreign affairs power to implement the binding legal commitments that the United States, acting through the President and Senate, had already undertaken in the Vienna Convention, Optional Protocol, United Nations Charter, and ICJ Statute. *See Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003); *Dames & Moore v. Regan*, 453 U.S. 654 (1981). In the face of the President's determination, any suggestion that United States federal or state courts could not or would not enforce the *Avena* Judgment would be inconceivable. *See* U.S. Br. Part IV.

Texas has failed to give Mr. Medellín the review and reconsideration required by the *Avena* Judgment and the President's determination. Mr. Medellín is therefore entitled to a writ of habeas corpus directing Texas to provide him with review and reconsideration in accordance with the *Avena* Judgment.

II.
THE *AVENA* JUDGMENT PROVIDES THE RULE OF DECISION IN MR. MEDELLÍN'S CASE.

A. Mr. Medellín Has Rights Under the Vienna Convention and *Avena* Judgment That Are Enforceable and Applicable in This Case.

1. The Vienna Convention and the *Avena* Judgment Are Binding Obligations of the United States.

There is no dispute that, by ratifying the Vienna Convention on Consular Relations, the United States committed itself to inform arrested or otherwise detained nationals of its treaty partners of their right to seek assistance from their consulates and to follow procedures adequate to give full effect to the purposes for which those rights were created. Vienna Convention, arts. 36(1), 36(2). There is no dispute that the United States, by ratifying the Optional Protocol, committed itself to submit disputes arising out of the interpretation and application of the Vienna Convention to the ICJ for resolution when called upon to do so by another party to the Optional Protocol. And, there is no dispute that the Vienna Convention, its Optional Protocol, the U.N. Charter, and the ICJ Statute constitute treaties binding upon the United States and hence the supreme law of the land under Article VI of the Constitution.

Finally, it is not disputed that, as a result, the *Avena* Judgment represents an international legal obligation binding upon the United States. Hence, the dispute on the questions presented is a narrow one: Respondent disputes only *this Court's* authority to give effect to that legal obligation.

2. The Supremacy Clause Requires State and Federal Courts to Give Effect to Treaty Rights in Cases in Which Those Rights Are in Issue.

By the Supremacy Clause, the Framers determined that "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land." U.S. CONST. art. VI, cl. 2. As a result, it has never

been doubted that when a treaty confers rights "of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would to a statute." *Edye v. Robertson (The Head Money Cases)*, 112 U.S. 580, 598-99 (1884); *see* Pet'r Br. 23-25.[1] Accordingly, this Court has consistently given effect to treaties conferring rights on foreign nationals, "their self-executing character assumed without discussion." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 111 reporter's note 5; *see* Pet'r Br. 26-29.[2]

Respondent's argument that the ICJ judgment is not a treaty and cannot be self-executing therefore misses the point. The Vienna Convention is undisputedly a treaty and is undisputedly self-executing. By the Optional Protocol, the United States agreed that the ICJ would resolve any disputes with Mexico concerning the interpretation and application of the Convention. Once a party to a treaty undertakes a substantive obligation and, at the same time, undertakes to abide by the result of a specified dispute resolution process, the decision that results from that process determines the extent of the treaty obligation, no less than if the decision were written into the treaty itself. Pet'r Br. 33-37. The Vienna Convention, as interpreted and applied by the *Avena* Judgment, therefore provides the "rule of decision" in this case. *The Head Money Cases*, 112 U.S. at 598-99.

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[1] *See generally* David Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075 (2000); Martin Flaherty, *History Right?: Historical Scholarship, Original Understanding, and Treaties as "Supreme Law of the Land"*, 99 COLUM. L. REV. 2095 (1999).

[2] Respondent suggests that this Court "has held that treaties provide judicially enforceable rights" only in "specific and narrow circumstances," but then acknowledges that the Court has regularly found such individual treaty rights to exist. Resp. Br. 27. The United States does not contest that treaties may create judicially enforceable rights on behalf of foreign nationals, but then unsuccessfully tries to distinguish two of this Court's cases demonstrating that point on the ground that they supposedly required implementing legislation. U.S. Br. 27-28; *see United States v. Rauscher*, 119 U.S. 407, 423, 430 (1886) (treaty was judicially enforceable; statute settled "any doubt" as to "construction," not enforceability); *Johnson v. Browne*, 205 U.S. 309, 317 (1907) ("'manifest scope and object of the treaty itself'" would have alone sufficed for *Rauscher*'s holding). And contrary to what Respondent's amici argue, *see* Resp. Int'l Law Profs. Br. 18, the history and text of the Supremacy Clause and this Court's precedent make clear that, while Congress has power to enact implementing legislation for treaties, such legislation is not ordinarily required. *See* Pet'r Br. 24-29 & nn. 19-22 (citing authorities). *See generally* Carlos Manuel Vazquez, *Treaty-Based Rights and Remedies of Individuals*, 92 COLUM. L. REV. 1082, 1101-10 (1992).

Respondent suggests that this Court and other courts in the United States are not capable of applying the Vienna Convention as federal law. Resp. Br. 41-42. He does not, however, identify any bar to the exercise of this Court's judicial authority.[3] The protection of individual rights within the United States criminal justice system is a core area of judicial competence and does not encroach on areas traditionally left to the Executive. *See* Pet'r Br. 31 n.25. This Court does not need the Executive's permission to apply the law in the cases before it, but in any event, the President has now determined that the interests of the United States require judicial enforcement of the *Avena* Judgment. *See* U.S. Br. Part IV & App. 2.

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[3] Respondent's sweeping suggestion that "the judiciary [is not] well suited to determine how the United States should act under a treaty," Resp. Br. 42, ignores the Supremacy Clause and the inclusion of treaties within Article III. *See* Pet'r Br. 24-25. The cases Respondent cites either do not support the proposition or establish the contrary. *See Chicago & Southern Airlines, Inc. v. Waterman Steamship Corp.*, 333 U.S. 103 (1948) (President's discretion to deny permit under Civil Aeronautics Act not judicially reviewable; no treaty rights involved); *Charlton v. Kelly*, 229 U.S. 447, 475-76 (1913) (Court has "plain duty" to enforce treaty unless abrogated by political branches); *Whitney v. Robertson*, 124 U.S. 190, 193-94 (1888) (by its terms, treaty did not bar legislation; in any event, Congress may repudiate treaty obligations by later-in-time statute).

3. Article 36 of the Vienna Convention Creates Individual Rights.

It is not disputed that in *Avena*, on an application brought by Mexico on its own and Mr. Medellín's behalf, the ICJ determined that Article 36(1) of the Vienna Convention confers individual rights, and that Respondent violated those rights in Mr. Medellín's case. It is also undisputed that the ICJ determined in that case that Article 36(2) of the Convention entitles Mr. Medellín to receive judicial review and reconsideration of his conviction and sentence in light of that violation and its potential resulting prejudice.

Since the *Avena* Judgment is binding on the United States as an interpretation and application of the Vienna Convention in Mr. Medellín's case, the question of individual rights under Article 36 cannot be relitigated now. *See* U.S. Br. 47 (President's determination precludes relitigation of questions decided in *Avena*). The arguments of Respondent and his amici concerning the proper interpretation of the treaty are therefore beside the point.

In any event, the ICJ correctly interpreted the treaty. In holding that the Convention conferred an individual right, the ICJ followed its decision in the *LaGrand Case (F.R.G. v. U.S.)*, 2001 I.C.J. 466 (June 27). There, the ICJ noted that Article 36(1)(b) of the Vienna Convention refers to the obligation to notify "the person concerned without delay of *his rights* under this subparagraph" (emphasis added) and that Article 36(1)(c) provides the national with the right to refuse consular assistance. *See LaGrand* ¶ 77. On that basis, the ICJ correctly concluded that the "ordinary meaning" of the language of Article 36 "admits of no doubt" as to its creation of individual rights. *Id.*[4]

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[4] The ICJ's determination that the Vienna Convention creates individual rights accords with the suggestion of this Court in *Breard v. Greene*, 523 U.S. 371, 376 (1998); the rulings of several United States courts, *e.g.*, *United States ex rel. Madej v. Schomig*, 223 F. Supp. 2d 968, 979 (N.D. Ill. 2002); *Standt v. City of New York*, 153 F. Supp. 2d 417,

(footnote continued)

4. The Habeas Corpus Statute Creates an Express Private Right of Action for Individuals Who Are in Custody in Violation of a Treaty.

Respondent argues not only that the Vienna Convention creates no individual rights but that no "private right of action" can be found there. Respondent looks in the wrong place. Treaties can and do create individual rights, but the manner in which the United States legal system gives effect to those rights is ordinarily a matter of United States law.[5]

In this case, the habeas corpus statute supplies Mr. Medellín's cause of action. Congress has explicitly authorized any person "in custody in violation of the Constitution, laws or *treaties* of the United States" to seek relief from the violation by petition for habeas corpus. 28 U.S.C. § 2241(c)(3) (emphasis added); *id.* § 2254(a) (same); *see also id.* § 2242 (prisoner may bring habeas petition on his own behalf). The habeas statute thus gives Mr. Medellín an express private right of action to enforce his treaty rights. *See*

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427 (S.D.N.Y. 2001); *see Ledezma v. State*, 626 N.W.2d 134, 150-51 (Iowa 2001) (collecting additional cases); and all known decisions of foreign courts after *LaGrand*, including the two cases relied on by Respondent, BGH 5 StR 116/01 (Nov. 7, 2001) (Germany); *R. v. Partak*, [2001] 160 CCC (3d) 553, ¶¶ 25-26 (Ont. Super. Ct.) (Canada). None of the foreign cases cited by Respondent or his amici hold otherwise. Respondent also misinterprets paragraph 5 of the Preamble to the Vienna Convention, in which the terms "privileges," "immunities," and "functions" are obvious references to those articles of the Convention that grant privileges and immunities to consular personnel. Vienna Convention arts. 29, 32-33, 35, 40-41, 43, 49-50, 52. By contrast, Article 36 speaks of the "rights" of ordinary citizens of the sending state, not the privileges and immunities of its consular officers.

[5] *See, e.g.*, ANTONIO CASSESE, INTERNATIONAL LAW 168 (2001) ("[I]nternational law does not contain any regulation of implementation. It thus leaves each country *complete freedom* with regard to how it fulfils, nationally, its international obligations.") (emphasis in original); *see also* Part II.B below.

Pet'r Br. 28-29.[6] That statute, which Respondent does not mention in this context, fully addresses Respondent's concern. This Court has consistently enforced treaties that did not themselves create domestic judicial remedies, where the habeas corpus statute or other domestic law provided a right of action. *See* Pet'r Br. 26 n.19, 29 n.22; Vazquez, *supra* note 2, at 1143-50.

B. Texas's Arguments Seeking to Thwart Enforcement of Its Legal Obligations Are Without Merit.

Respondent also offers a series of arguments to suggest that even though the *Avena* Judgment interprets and applies a treaty that is self-executing in United States law, and even though the *Avena* Judgment is a binding legal obligation of the United States, this Court is powerless to stop Texas from continuing to violate that obligation. None of these arguments has merit.

First, Respondent argues that, because Article 94 of the United Nations Charter authorizes the Security Council to enforce ICJ judgments against noncompliant states, this Court is barred from enforcing the *Avena* Judgment on its own authority. Resp. Br. 34-35; *see* U.S. Br. at 34-35. That argument confuses the United Nations Charter with the United States Constitution.

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[6] Contrary to what the United States argues, U.S. Br. 29, this Court's willingness in *Wildenhus's Case*, 120 U.S. 1 (1887), to enforce on habeas corpus the Belgian consul's right to try a Belgian crewmember provides square support for the power of federal courts to enforce the provisions of a treaty by habeas corpus. State courts similarly hear petitions for post-conviction relief under their own laws. The requirement that state courts apply federal law in those proceedings is mandated by the Supremacy Clause, *Torres v. Oklahoma*, No. PCD-04-442 (Okla. Crim. App. May 13, 2004) (P.A. 142a-163a) (enforcing *Avena* Judgment in case of national whose rights were adjudicated there), and does not violate any prohibition against federal commandeering of state officials, *Printz v. United States*, 521 U.S. 898, 928-29 (1997) (citing *Testa v. Katt*, 330 U.S. 386 (1947)).

By Article 94(1) of the Charter, the United States has undertaken to comply with an ICJ judgment in cases in which it is a party. If the United States fails to comply, the other party to the case may bring the matter to the Security Council under Article 94(2).

The question before this Court, however, is whether and how, *by action within its own legal system*, the United States will comply with the international obligation reflected in the *Avena* Judgment, not what rights Mexico might have as a matter of international law if the United States does not comply. The U.N. Charter, the Optional Protocol, and Article 59 of the ICJ Statute say nothing about the former question. To the contrary, under international law, the means by which a State party complies with its treaty obligations is generally left to its domestic law,[7] subject in this case to the Vienna Convention's proviso that those means must be sufficient to give full effect to the rights of consular notification and access. *See* Vienna Convention art. 36(2). Consistent with that principle, the *Avena* Judgment expressly acknowledged that as long as the review and reconsideration provided by the United States met the criteria set forth in the Judgment, the United States could provide that review and reconsideration by "the means of its own choosing." P.A. 261a-262a, 273a, ¶¶ 138-39, 153(9) (*Avena* Judgment).

Hence, the question of the authority of this Court to enforce treaty compliance in the United States is a question of United States constitutional law, not international law. The Framers answered that question over 200 years ago, when they provided in the Supremacy Clause that courts must give effect to rights created by treaty in all cases within their jurisdiction. Indeed, a principal reason that the Framers made treaties judicially enforceable was to avoid noncompliance that could give rise to international reprisals, such as an invocation by Mexico of Article 94(2) in the circumstances here. Pet'r Br. 23; *see* Vazquez, *supra* note 2, at 1124-25.

Second, Respondent argues that he is not bound by the *Avena* Judgment because Texas and Mr. Medellín were not parties to the case. As this Court has made clear, however, "[i]n respect of all international negotiations and compacts, and in respect of our foreign relations generally, state lines disappear." *United States v. Belmont*, 301 U.S. 324, 331 (1937). Texas and the United States are distinct entities domestically, but in the sphere of foreign relations, the United States acts as a single and indivisible nation, and the federal government speaks on behalf of the nation as a whole. *See* Pet'r Br. 19-20 & nn. 10, 12; *id.* at 22 & n.14. Because the United States appeared in *Avena*, so too did Texas, and it is bound by the result.

Likewise, in *Avena*, Mexico asserted not only its own rights, but also those of 54 specific nationals, including Mr. Medellín, in accordance with its right of diplomatic protection under international law.[8] *See* P.A. 188a, ¶ 12, cl. (1); 190a, ¶ 13, cl. (1); 194a, ¶ 14, cl. (1). The ICJ explicitly adjudicated Mr. Medellín's rights and issued a treaty-based remedy in his own case on the basis of the violation by Texas state officials of his individual rights under the Vienna Convention. Thus, the *Avena* Judgment binds both Respondent and Petitioner.[9]

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[7] *See, e.g.*, CASSESE, *supra* note 5, at 168. Accordingly, foreign cases applying foreign constitutions are irrelevant to the question whether the *Avena* Judgment is judicially enforceable under the United States Constitution. In any event, Respondent fails to cite a single foreign case suggesting that a binding ICJ judgment adjudicating individual rights would not be enforceable in the domestic courts. *See* Resp. Br. 49 (citing German and Canadian cases that recognized that Vienna Convention created enforceable individual rights, but rejected the particular claims in those cases on their merits); *see also* note 4 above.

[8] It is an "elementary principle of international law" that a State may assert the rights of its nationals in international judicial proceedings in the exercise of diplomatic protection. *Mavrommatis Palestine Concessions (Greece v. U.K.)*, 1924 P.C.I.J. (ser. A) no. 2, at 12 (Aug. 30), *available at* http://www.icj-cij.org/icjwww/idecisions/icpij. *See generally Barcelona Traction, Light & Power Co. (Belg. v. Spain)*, 1970 I.C.J. 3 (Feb. 5) (available on Westlaw). The United States has frequently asserted its right of diplomatic protection on behalf of United States citizens. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 713, Rep. Note 9; *See, e.g.*, *United States Diplomatic and Consular Staff in Tehran (U.S..v. Iran)*, 1980 I.C.J. 3, 6, ¶ 8 (May 24).

Third, Respondent claims that this Court's per curiam decision in *Breard v. Greene*, 523 U.S. 371 (1998), should control this case. As Petitioner has explained, *Breard* arose on fundamentally distinguishable facts, *see* Pet'r Br. 42-44, but if *Breard* presented an obstacle to the relief Petitioner seeks, it should not be followed in light of the *Avena* Judgment, *see* Pet'r Br. 44-45. This Court has recognized that when new international law materials are brought to its attention that were not available to it previously, it is not bound by its earlier interpretation of a treaty. *See United States v. Percheman*, 32 U.S. (7 Pet.) 51 (1833) (overruling earlier precedent after examining Spanish text of treaty). Particularly given the hurried circumstances in which *Breard* was issued, the absence of oral argument, and the fact that it was a denial of discretionary review, the considerations applicable to the overruling of fully considered precedent set forth in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), should not apply. *See* Pet'r Br. 44-45.[10]

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[9] *See, e.g., Société Commerciale de Belgique (Belg. v. Greece)*, 1939 P.C.I.J. (ser. A/B) no. 78, at 175, 178 (June 15) (arbitration award in proceeding between Greece and Belgian company was res judicata in action between Greece and Belgium in which Belgium exercised its right of diplomatic protection on behalf of Belgian company).

[10] If they did apply, the *Casey* factors would strongly support overruling *Breard*: (1) *Breard* puts the United States in violation of well-established international law, which renders it "intolerable" and "practical[ly] [un]workable"; (2) the law of the Vienna Convention as reflected in *LaGrand* and *Avena*, which is international rather than domestic law, "ha[s] so far developed" as to undermine the holding in *Breard*; (3) the ICJ's determination of the merits of Mr. Medellín's Vienna Convention claim robs *Breard*, in which there had been no such ruling, of "its significant application"; and (4) because it is unlawful for Texas to fail to inform noncitizen arrestees of their Vienna Convention rights, regardless of whether they have an individual remedy in habeas

(footnote continued)

Finally, Respondent argues that enforcing the Vienna Convention, as interpreted and applied by the ICJ in Mr. Medellín's case, would raise "serious constitutional questions" regarding the Article III requirement that the "judicial Power of the United States" be vested in the courts established under that article, and the Article II requirement that the President "shall appoint . . . Officers of the United States." Respondent's concerns are without merit.

The United States has never subscribed to the "parochial concept that all disputes must be resolved under our laws and in our courts." *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972). From the Nation's infancy to the present day, the federal political branches have repeatedly found it within the foreign-policy interests of the United States to agree to submit disputes to binding adjudication by international tribunals.[11] Such treaties raise no serious concern under Article III; to the contrary, this Court has made clear that the federal government may require specific categories of disputes to be adjudicated by international tribunals. *See Dames & Moore v. Regan*, 453 U.S. 654, 686-87 (1981) (upholding international agreement establishing Iran-U.S. Claims Tribunal).[12]

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corpus for Texas's violations, Texas cannot justifiably have relied on *Breard* as a reason for continuing to violate the Vienna Convention. *Casey*, 505 U.S. at 854-55.

[11] *See, e.g.*, Treaty of Amity, Commerce and Navigation, art. 6, Nov. 19, 1794, U.S.-Gr. Br., 12 Bevans 13, T.S. No. 105; U.S. Dep't of State, *2004 Model BIT*, arts. 1, 24-34, *at* http://www.state.gov/documents/organization/38710.pdf; *see also* Mexico Amicus Br. 6.

[12] *See also, e.g., Thomas v. Union Carbide Agric. Prods.*, 473 U.S. 568 (1985) (upholding constitutionality of arbitration mandated by federal law and binding on EPA); *Auffmordt v. Hedden*, 137 U.S. 310, 326-27 (1890) (upholding authority of United States to submit customs valuation disputes to binding arbitration). *See generally Constitutional Limitations on Federal Government Participation in Binding Arbitration*, 1995 OLC LEXIS 17, at *8-38 (U.S. Dep't of Justice, Ofc. of Legal Counsel, Sept. 7, 1995) (citing and discussing authorities).

In addition, this Court has long recognized and enforced foreign courts' judgments on the basis of comity without reexamining the merits of those decisions. *See, e.g., Hilton v. Guyot*, 159 U.S. 113 (1895); *Ritchie v. McMullen*, 159 U.S. 235 (1895). The judgments of state courts, which are not Article III courts or appointed by the President, have been given full faith and credit by statute from the time of the First Judiciary Act. *See* 28 U.S.C. § 1738; *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 374-75 (1996). This Court, moreover, has repeatedly upheld delegations of federal adjudicative authority not only to federal administrative agencies, *e.g., Atlas Roofing Co. v. OSHA*, 430 U.S. 442, 455 (1977), but even to private individuals unaffiliated with the federal government, *see Schweiker v. McClure*, 456 U.S. 188, 198-99 (1983). It has also indicated that treaties delegating adjudicative authority to foreign governments in criminal and civil matters are valid. *See Wildenhus's Case*, 120 U.S. 1, 17 (1899); *Glass v. The Sloop Betsey*, 3 U.S. (3 Dall.) 6 (1794).[13] Respondent's Article III delegation argument is therefore without merit.

For all the same reasons, members of an international tribunal to which the United States has submitted a dispute are not "officers" of the United States, but "arbitrators between the two countries." Alexander Hamilton, THE DEFENCE No. 37 (1796) (rejecting a similar objection to an early treaty establishing an international commission), *reprinted in* 20 THE PAPERS OF ALEXANDER HAMILTON 13, 20 (Harold C. Syrett ed., 1974). As a matter of longstanding

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[13] There is nothing unusual about federal enforcement of foreign courts' jurisdiction over the rights of individuals who are within the United States. The United States has unquestioned power to make extradition treaties, which require individuals—United States citizens and aliens alike—to be delivered to a foreign country to face criminal prosecution under its laws or to serve a prison sentence previously imposed by its courts. *See, e.g., Neely v. Henkel*, 180 U.S. 109, 122-23 (1901); *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540, 569-70 (1840).

practice, members of international tribunals created by treaty have never been regarded as officers of the United States. *See Constitutional Limitations*, *supra* note 12, at *13-22; *Office—Compensation*, 22 Op. Att'y Gen. 184 (1898).[14]

In short, Respondent's suggestion that enforcing a non-Article III judgment would somehow be an impermissible delegation of judicial power or improper appointment of federal officers is directly contrary to over 200 years of well-settled precedent.

C. In Any Event, the Court Should Recognize the *Avena* Judgment on Grounds of Comity and Uniform Treaty Interpretation.

Even apart from its binding effect, the ICJ's interpretation and application of the Vienna Convention in the *Avena* Judgment should be enforced as a matter of comity. Pet'r Br. 45-48; *see* U.S. Br. Part IV & App. 2. The policy of showing respect to the judgments issued by foreign courts applies with even greater force to a judgment issued by an international court that the United States has had a major hand in establishing and before which the United States appeared and litigated in the proceedings from which the judgment resulted. Pet'r Br. 46-47. The President's determination removes any possible argument that extending comity to the *Avena* Judgment would violate the public policy of the United States, which acts as a single nation in matters of foreign relations.

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[14] An "appointment" of a federal "officer" has not occurred unless four elements are present: "tenure, duration, emolument, and duties." *United States v. Germaine*, 99 U.S. 508, 511-12 (1879). None is present here: the members of the ICJ hold no position in the federal government, *see* ICJ Statute, art. 16(1); they are only occasionally called upon to decide cases involving the United States; they are not compensated by the United States, *see* ICJ Statute, art. 32; and they hold no duties assigned by United States domestic law. *See generally* Neil Kinkopf, *Of Devolution, Privatization, and Globalization: Separation of Powers Limits on Congressional Authority to Assign Federal Power to Non-Federal Actors*, 50 RUTGERS L. REV. 331, 341-44 (1998).

The policy of uniform treaty interpretation provides an additional reason to follow the *Avena* Judgment. Texas argues that this Court's own prior decision in *Breard* should prevail over the ICJ's decision.[15] Treaty interpretation, however, is a question of international law, not the law of any one country that is a party to the treaty. *See, e.g., Air France v. Saks*, 470 U.S. 392, 399 (1985); *The Amiable Isabella*, 19 U.S. (6 Wheat.) 1, 71-72 (1821).[16] Rather than leave treaty interpretation up to national courts alone, the parties to the Optional Protocol agreed that the ICJ would have final authority to resolve disputes over the treaty's interpretation and application.

III.
RESPONDENT'S ATTEMPTS TO INSERT NEW ISSUES PROVIDE NO GROUNDS FOR THE COURT NOT TO REACH THE QUESTIONS PRESENTED.

A. Whether Mr. Medellín Has Made a Substantial Showing That His Right Is "Constitutional" Under 28 U.S.C. § 2253 Is Not Properly Before the Court.

The judgment on review before this Court is the denial of a certificate of appealability ("COA"). A COA may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). A "substantial showing" means that "reasonable jurists" would

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[15] Respondent's assertion that certain foreign decisions are inconsistent with the holdings of *Avena* that are relevant to the issues before this Court is mistaken. *See* note 4 above.

[16] The Constitution makes international law "part of our [federal] law," *The Paquete Habana*, 175 U.S. 677, 700 (1900), just as it makes federal law "part of the laws of every State," *Blythe v. Hinckley*, 173 U.S. 501, 508 (1899). The interpretation of an international treaty in a United States court remains a question of international law, as the interpretation of a federal statute in state court remains a question of federal law.

find the issue at least "debatable." *Tennard v. Dretke*, 124 S. Ct. 2562, 2569 (2004) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

In the Court of Appeals and in his opposition to certiorari, Respondent argued only that Mr. Medellín had not made a substantial showing that he had been *denied* a right. He did not contest that the right Mr. Medellín was seeking to enforce was *constitutional*. He makes that argument for the first time in his brief on the merits.

It is this Court's usual practice not to reach issues that were not decided by the court below. *See, e.g., Cass County v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 115 (1998). Nor will the Court consider a threshold issue that has not been called to its attention in a brief in opposition at the petition stage. Sup. Ct. R. 15.2; *see, e.g., Baldwin v. Reese*, 541 U.S. 27, 34 (2004). This Court should not reach out to decide this new issue without the benefit of a decision in the Court of Appeals or a full opportunity for the parties to develop the issue there or in this Court.

Any suggestion that Respondent's objection is jurisdictional, *see* U.S. Br. 13-14, is foreclosed by this Court's decision in *Slack*. Although Mr. Slack had not made a substantial showing of the denial of a constitutional right, the Court reached other issues in the case relevant to the issuance of a COA and then remanded to the Court of Appeals to allow him to make the necessary showing. *Slack*, 529 U.S. at 483-89. While the issuance of a COA may be a jurisdictional prerequisite for the Court of Appeals to hear an appeal on the merits, *see Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003), the decision under review here is not an appeal on the merits. Instead, as in *Slack*, it is a decision denying a COA in the first instance.

The Court plainly has jurisdiction to review that decision. *Hohn v. United States*, 524 U.S. 236 (1998). And in the face of multiple threshold issues, the Court need not reach them in any particular order even if they are "jurisdictional." *Tenet v. Doe*, 125 S. Ct. 1230, 1235 n.4 (2005). If Respondent wishes to raise additional grounds for denying a COA beyond the grounds decided in the Court of Appeals and raised at the petition stage in this Court, he can do so in the courts below on remand if those grounds have not been waived. *See Baldwin v. Reese*, 541 U.S. at 34; *Slack*, 529 U.S. at 489.

In any event, even if there were a jurisdictional bar to the Court's ability to grant a writ of certiorari to review the Fifth Circuit's denial of a COA on a highly important question of federal law, there is not even an implication, much less a clear statement, in the language of § 2253 that would bar this Court, in the absence of any other avenue of appellate review, from reaching that question by treating the papers before the Court as a petition for an original writ of habeas corpus under 28 U.S.C. § 2241, or a writ of mandamus or certiorari to the District Court under 28 U.S.C. § 1651(a). *See, e.g., Felker v. Turpin*, 518 U.S. 651, 658-62 (1996) (habeas corpus); *Idlewild Bon Voyage Liquor Corp. v. Epstein*, 370 U.S. 713 (1962) (mandamus to District Court); *United States Alkali Export Ass'n v. United States*, 325 U.S. 196, 201-02 (1945) (common-law certiorari to District Court).[17] Review by extraordinary writ would be particularly appropriate in this case because "[t]he case involves the dignity and rights of a friendly sovereign state," *Ex parte Republic of Peru*, 318 U.S. 578, 586-87 (1943), and the lower court's actions "threaten the separation of powers," *Cheney v. United States Dist. Court*, 124 S. Ct. 2576, 2587 (2004), and implicate "a delicate area of federal-state relations," *Will v. United States*, 389 U.S. 90, 95 (1967) (citing *Maryland v. Soper*, 270 U.S. 9 (1926)).[18]

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[17] The characterization in the Petition of the writ sought is not controlling. *See, e.g., Peralta v. Heights Med. Ctr.*, 485 U.S. 80, 84 n.4 (1988) (appeal treated as certiorari petition); *Pitts v. Wainwright*, 408 U.S. 941 (1972) (habeas corpus petition treated as certiorari petition).

[18] When Congress has meant to foreclose extraordinary writ review in addition to ordinary appellate review, it has said so explicitly. *See, e.g.*, 28 U.S.C. § 1447(d) (barring review of certain orders "on appeal or

(footnote continued)

B. Mr. Medellín Has Made a Substantial Showing of Denial of a "Constitutional" Right Within the Meaning of § 2253(c)(2).

Should the Court reach the issue, Mr. Medellín has made a substantial showing that his right to enforcement of the Vienna Convention is a *constitutional* right within the meaning of 28 U.S.C. § 2253(c)(2). Mr. Medellín's habeas corpus petition squarely presented a claim that Texas's failure to provide a forum for enforcing his Vienna Convention rights violated his due process rights under the Fourteenth Amendment. *See* Amended Petition for Writ of Habeas Corpus, June 18, 2002, at 2, 28-29.

The Vienna Convention is the law of the land. U.S. CONST. art. VI. As interpreted and applied in the *Avena* Judgment, Article 36(2) of the Convention confers on Mr. Medellín an individual right to review and reconsideration of his conviction and sentence in light of the Article 36(1) violation without regard to procedural default rules. Where the substantive law of the land creates an individual right enforceable in judicial proceedings, the Due Process Clause bars a state from denying a litigant "an opportunity to be heard upon [his] claimed [right]." *See Logan v. Zimmerman*, 455 U.S. 422, 429-30 (1982) (due process prevents states from denying litigants a forum in which to enforce rights) (*quoting Boddie v. Connecticut*, 401 U.S. 371, 380 (1971)). Yet that is exactly what Texas has done here by closing its courts to the enforcement of treaty rights. *See* P.A. 56a, ¶ 15 ("[T]he applicant, as a private individual, lacks standing. . . . [T]reaties operate as contracts among nations; thus, [the] offended nation, not [an] individual, must seek redress for

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otherwise"); *see also Felker*, 518 U.S. at 660-61 (limitation on appeal and certiorari in 28 U.S.C. § 2244(b)(3)(E) did not restrict original habeas corpus; any other reading would raise substantial constitutional concerns); *cf. Utah v. Evans*, 536 U.S. 452, 463 (2002) ("We read limitations on our jurisdiction to review narrowly."). Congress has not done so here. *See* 28 U.S.C. § 2253(c)(2).

violation of sovereign interests."). The Texas courts thereby deprived Mr. Medellín of his right to review and reconsideration, a right arising from the Vienna Convention but guaranteed by the Constitution.

In addition, Mr. Medellín's claim based on the Supremacy Clause is not a run-of-the-mill preemption case, because the Texas courts have refused to apply federal treaty rights at all. That kind of outright blindness to or defiance of settled constitutional law is precisely the circumstance in which federal habeas corpus review is most essential. Regardless of how an ordinary preemption claim should be treated, a refusal by the state even to apply federal law should be regarded as a violation of a constitutional right under the Supremacy Clause for purposes of 28 U.S.C. § 2253(c)(2).

In any event, the Court should reject the argument that Congress, by adopting the current version of 28 U.S.C. § 2253 in the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 ("AEDPA"), in any way intended to withdraw the jurisdiction of the Courts of Appeals to review denials of habeas petitions on treaty claims. Respondent relies heavily on *Murphy v. Netherland*, 116 F.3d 97, 99-100 (4th Cir. 1997), but he does not advise this Court that at least five Courts of Appeals (including the Fourth Circuit) have issued COAs on treaty claims, or have heard appeals on treaty claims after a District Court's grant of a COA, without pausing at the supposed exclusion of that category of claims.[19] Other Courts of Appeals have denied COAs for lack of a substantial showing of violation of a right, without any suggestion that the fact that the claim arose

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[19] *See Villagomez v. Sternes*, 88 Fed. Appx. 100 (7th Cir. 2004) (reaching merits of Vienna Convention claim after grant of COA); *Mendez v. Roe*, 88 Fed. Appx. 165 (9th Cir. 2004) (same); *Gulertekin v. Tinnelman-Cooper*, 340 F.3d 415 (6th Cir. 2003) (same); *Breard v. Pruett*, 134 F.3d 615 (4th Cir. 1998) (same); *see also Hain v. Gibson*, 287 F.3d 1224 (10th Cir. 2002) (same, under International Covenant on Civil and Political Rights ("ICCPR")).

under a treaty was an independent reason for denying a COA.[20] Accepted principles of statutory interpretation, the structure of the statute as a whole, and the avowed purposes of AEDPA all demonstrate that Congress did not intend § 2253(c)(2) to foreclose appellate review of meritorious habeas corpus cases involving states' failure to give effect to treaty rights.

As an initial matter, when interpreting the application of § 2253(c)(2) to treaty claims, the Court must give due weight to the principle, first articulated by Chief Justice Marshall in *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804), that in the absence of a clear instruction to do so from Congress, courts should not construe statutes in a manner that would place the United States in breach of its treaty obligations.[21] That principle should apply with equal force here. The Framers accorded treaties the status of supreme federal law and placed them within the federal judicial power in order to avoid breaches of the international obligations of the United States. Pet'r Br. 23-24. For the same reason, Congress gave the federal courts power to grant habeas corpus to certain state prisoners held in violation of the law of nations long before it gave them power to issue habeas corpus to protect constitutional rights in the narrower sense that Texas now advocates. *See id.* at 29 n.23. This

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[20] *See* P.A. 117 (denying COA for Vienna Convention claim); *Plata v. Dretke*, 111 Fed. Appx. 213 (5th Cir. 2004) (same); *see also Kasi v. Angelone*, 300 F.3d 487 (4th Cir. 2002) (same, under extradition treaty); *Beazley v. Johnson*, 242 F.3d 248 (5th Cir. 2001) (same, under ICCPR); *Ross v. United States Marshal*, 168 F.3d 1190 (10th Cir. 1999) (same, under extradition treaty).

[21] *See also, e.g., Weinberger v. Rossi*, 456 U.S. 25, 32 (1982) (construing word in statute to have different meaning than in other contexts, in light of presumption that Congress does not intend to breach international obligations); *Cheung Sum Shee v. Nagle*, 268 U.S. 336, 345-46 (1925) (treating existing treaty right as exception to statute, in light of presumption that Congress does not intend to breach international obligations); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 115.

Court should not construe the language of § 2253(c)(2) to undermine this long-held respect for the federal judicial role in treaty enforcement, by giving the District Courts power to dispose of treaty claims without review on appeal, absent a clear indication that Congress intended to do so.

Respondent suggests that *Slack v. McDaniel*, 529 U.S. 473 (2000), somehow decided *sub silentio* that treaty claims are not appealable under § 2253(c)(2). In *Slack*, however, the Court merely noted that § 2253(c)(2) meant to codify the standard for a certificate of probable cause established in *Barefoot v. Estelle*, 463 U.S. 880, 892-94 (1983), and remarked that "Congress had before it the meaning *Barefoot* had given to the words it selected; and we give the language found in § 2253(c) the meaning ascribed it in *Barefoot*, with due note for the substitution of the word 'constitutional.'" 529 U.S. at 483.[22] The effect of the substitution of "constitutional" for "federal" was not before the Court in *Slack*, and the Court merely noted the change, leaving the issue of its effect, if any, to be decided in a future case. Nothing in the text of AEDPA or the legislative record suggests that any substantive change was intended.

First, as this Court has already remarked, "[a]ll we can say [about AEDPA] is that in a world of silk purses and pigs' ears, the Act is not a silk purse of the art of statutory drafting." *Lindh v. Murphy*, 521 U.S. 320, 336 (1997); *see* Anthony G. Amsterdam, *Foreword*, in RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE, at v (4th ed. 2001) ("The statutory

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[22] *See also Williams (Michael) v. Taylor*, 529 U.S. 420, 434 (2000) (cited in *Slack*, 529 U.S. at 483) ("[W]hen the words of the Court are used in a later statute governing the same subject matter, it is respectful of Congress and of the Court's own processes to give the words the same meaning in the absence of specific direction to the contrary."); *Utah v. Evans*, 536 U.S. 452, 463 (2002) ("We do not normally read into a statute an unexpressed congressional intent to bar jurisdiction that we have previously exercised.").

language teems with problems and non-obvious alternative interpretations that need to be identified and sorted out by reference to a tangled legislative history."). Illustrating that point, AEDPA uses the words "constitutional" and "federal" without any discernible distinction. *See, e.g.*, 1 HERTZ & LIEBMAN, § 9.1 (cataloguing AEDPA's vacillation between the terms "constitutional" and "federal"). As a result, reading "constitutional" as more restrictive than "federal" throughout AEDPA would lead to pointless distinctions. *Compare, e.g.*, 28 U.S.C. §§ 2253(c)(2), 2254(e)(2)(A)(i) (provisions referencing "constitutional" rights), *with id.* §§ 2262(b)(3), 2264(a)(2) (similarly worded provisions in "opt-in" portion of statute, which Congress intended to be *more* restrictive of habeas review, referencing "Federal" rights).

Second, the legislative history of AEDPA contains not the slightest hint that Congress intended to depart from the *Barefoot* standard. AEDPA was intended to "streamline Federal appeals" for prisoners under sentence of death, principally by curbing successive petitions. Statement on Signing the Antiterrorism and Effective Death Penalty Act of 1996, 1996 Weekly Comp. Pres. Doc. 719, 720 (Apr. 24, 1996) (Pres. Clinton); *see also, e.g.*, Statement of Sen. Hatch, 142 Cong. Rec. S3446-47 (Apr. 17, 1996) ("Federal habeas review exists to correct fundamental defects in [federal law]" and the new AEDPA standard does not affect that fundamental scope of review). Consistent with that objective, the COA requirement was meant to allow for summary disposition of frivolous or insubstantial appeals by codifying the standard adopted by this Court in *Barefoot*. As explained in the first committee report on the legislation that became AEDPA,

> The bill also strengthens the certificate of probable cause requirement by providing (in proposed 28 U.S.C. § 2253(c)) that a certificate may issue only on a substantial showing of the denial of a federal right. The bill thus enacts the standard of *Barefoot v. Estelle*, 463 U.S. 880 (1983).

H.R. Rep. No. 104-23, at 9 (Feb. 8, 1995). In a later version, after several competing drafts were merged, "certificate of appealability" replaced "certificate of probable cause," and the word "constitutional" replaced "federal." But there is no indication that the substitution affected the codification of *Barefoot*. To the contrary, after the change was made, the leading supporters of the bill continued to testify that the statute merely codified the *Barefoot* standard.[23]

The legislative history of AEDPA is silent on the matter of habeas corpus review to protect treaty rights, and it is clear that Congress did not consider it. Congress made no alterations to the provisions expressly authorizing this Court, its Justices, and Circuit Judges, as well as District Courts, to issue writs of habeas corpus to individuals held in state custody in violation of the "*treaties* of the United States." 28 U.S.C. §§ 2241(c)(3), 2254(a) (emphasis added). Nor did it touch the provision, enacted in the 1840s, allowing noncitizens domiciled abroad to petition for habeas corpus where the validity, under international law, of an act done under color of foreign law is at issue. 28 U.S.C. § 2241(c)(4); *see* Pet'r Br. 29 n.23. There is no basis to believe that Congress meant to cut off appellate review in those two classes of cases, which arise only infrequently, but invariably

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[23] *See Concerning Habeas Corpus Reform: Hearings on H.R. 729, S. 623, and S. 3 Before the Comm. of the Judiciary, United States Senate*, 141st Cong., 1st Sess. (1995) (statement of Daniel Lungren, Attorney General, California) (discussing *Barefoot* as consistent with amendment to § 2253); *Concerning Habeas Corpus Reform: Hearings on H.R. 729, S. 623, and S. 3 Before the Comm. of the Judiciary, United States Senate*, 141st Cong., 1st Sess. (1995) (statement of Gale A. Norton, Attorney General of Colorado) ("The addition of the *Barefoot v. Estelle* standard to the appeal section of the habeas statute—28 U.S.C. § 2253—is an important codification of existing case law."). California Attorney General Daniel Lungren "played a prominent role in the drafting of the habeas corpus reform provisions." 141 CONG. REC. S76 (daily ed. Jan. 4, 1995) (statement of Senator Dole).

implicate vital matters affecting the national interest when they do arise.

Third, Respondent's interpretation is inconsistent with this Court's holding that AEDPA should not be interpreted to "close [this Court's] doors to a class of habeas petitioners seeking review without any clear indication that such was Congress' intent." *Castro v. United States*, 540 U.S. 375, 381 (2003). This Court has consistently construed AEDPA to ensure at least one meaningful opportunity for postconviction review in a District Court, in a Court of Appeals, and by *certiorari* in this Court.[24] AEDPA was intended to allow habeas petitioners "one bite at the apple" in federal court;[25] Respondent is trying to take away the apple before Petitioner has had a full bite.[26]

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[24] *See Castro*, 540 U.S. at 380-81 (rejecting government's proposed reading of AEDPA jurisdiction); *Clay v. United States*, 537 U.S. 522, 530 (2003) (rejecting government's "constricted reading" of AEDPA's statute of limitations provision to preserve availability of federal court review); *Carey v. Saffold*, 536 U.S. 214 (2002) (construing term "pending" broadly to ensure the availability of federal habeas review after state post-conviction review); *Stewart v. Martinez-Villareal*, 523 U.S. 637, 644-45 (1998) (forgoing a literal reading of the statute due to the "far-reaching and seemingly perverse" consequence that some habeas corpus petitioners would never "receive an adjudication of [their] . . . claim[s]" in federal court).

[25] 141 Cong. Rec. S7877 (daily ed. June 7, 1995) (statement of Sen. Dole); 141 Cong. Rec. S7662 (daily ed. June 5, 1995) (statement of Sen. Feinstein); *see also* Bryan A. Stevenson, *The Politics of Fear and Death: Successive Problems in Capital Federal Habeas Corpus Cases*, 77 N.Y.U. L. Rev. 699, 772 (2002) ("[B]oth the language of the provisions and the underlying legislative history [of AEDPA] strongly suggest that Congress intended to ensure that petitioners would have at least one full, fair opportunity to raise each meritorious claim at each of the levels of federal court habeas corpus review.").

[26] In addition, Respondent's interpretation would not be outcome-neutral as between prisoners and the state. Construing § 2253(c)(3) to bar the review of *meritorious* claims, as opposed to the historic practice of foreclosing insubstantial appeals only, would skew the development of the law: errors that favor prisoners could be upset by appeal, while errors

(footnote continued)

Finally, this Court generally has construed statutes governing appellate jurisdiction to avoid, whenever possible, the anomalous result of foreclosing all appellate review of a single District Judge's final decision on an important question of federal law. When faced with a statute that would *prevent* appellate review of a final District Court decision, or would prevent this Court's review of a final appellate decision, the Court has repeatedly adopted a narrow construction—either confining the statute to the precise circumstances that Congress had contemplated, *see, e.g.*, *Castro*, 540 U.S. at 380-81; *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 711-12 (1996) (citing cases), or declining to extend the statute beyond a narrow reading of its words, *see Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 85-89 (2000), or, as a last resort, construing the statute to leave open the possibility of review by extraordinary writ, *see, e.g.*, *Felker v. Turpin*, 518 U.S. 651, 658-62 (1996). In light of the strong presumption in favor of the availability of appellate review, the term "constitutional right" as used in § 2253(c)(2) should be construed in favor of allowing the Courts of Appeals to hear appeals from habeas cases raising substantial questions of state deprivation of treaty rights.

For all of these reasons, reasonable jurists could find it, at a minimum, debatable whether Mr. Medellín has made a substantial showing of the violation of a constitutional right within the meaning of 28 U.S.C. § 2241(c)(3). For this reason, a COA should have issued even if Respondent had raised this argument in the Court of Appeals. *See Tennard*, 124 S. Ct. at 2569.

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that favor the government, no matter how egregious, could not be corrected. *See* Fed. R. App. P. 22(b)(3) (state does not need COA to appeal). This Court has construed AEDPA to minimize such asymmetries. *See Castro*, 540 U.S. at 380.

C. Neither Section 2254(d)(1) Nor the *Teague* Rule Poses a Bar to Mr. Medellín's COA Application.

Respondent further argues that even if 28 U.S.C. § 2253(c)(2) did not bar a COA, Mr. Medellín's request for a COA would fail to raise a substantial question because 28 U.S.C. § 2254(d)(1) would allegedly bar relief. Resp. Br. 11; *see also* U.S. Br. 15-17. Again, there is no reason for the Court to reach out to decide questions that are beyond the scope of the questions presented in the Petition and that were not decided by the Court of Appeals. Neither Respondent nor *amici* contend that the § 2254(d)(1) point is jurisdictional or limits the Court's power to reach the questions presented.[27]

In any event, § 2254(d)(1) is inapplicable here by its terms. That provision bars federal habeas corpus relief unless the state court adjudication (i) "on the merits" (ii) "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." In the posture of an application for a COA, the issue is whether "reasonable jurists" would find the District Court's conclusions as to the applicability of § 2254(d)(1) to be "debatable." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). For three reasons, this standard is satisfied.

First, § 2254(d)(1) expressly limits its application to claims that were "adjudicated on the merits in State court proceedings." The effect of the *Avena* Judgment on Mr. Medellín's Vienna Convention rights was never considered by the state court, because the *Avena* Judgment had not yet been rendered at the time of his state-court petition. Respondent therefore cannot invoke § 2254(d)(1) to immunize the issue—which arose only after state post-conviction review was completed—from any review by this Court. As recently as last Term, this Court recognized that § 2254(d)(1) may not apply where new factual developments transpire after the state-court judgment, "on the theory that there is no relevant state-court determination to which one could defer." *Holland v. Jackson*, 124 S. Ct. 2736, 2738 (2004) (per curiam). At least five Courts of Appeals have so held.[28]

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[27] *See Williams (Terry) v. Taylor*, 529 U.S. 362, 404 (2000) (characterizing § 2254(d)(1) as a constraint only on a federal habeas court's power to grant the writ); *Weeks v. Angelone*, 528 U.S. 225, 227-37 (2000) (considering merits of the federal claim and only then assessing whether § 2254(d) serves as a defense to issuance of the writ); *Ramdass v. Angelone*, 530 U.S. 156, 165-178 (2000) (same); *see also Slack v. McDaniel*, 529 U.S. 473, 489 (2000) (resolving one COA-related issue; remanding others for decision by court below); *Tenet v. Doe*, 125 S. Ct. 1230, 1235 n.4 (2005) (reaching only one of two threshold issues raised).

Second, it is axiomatic that a state's application of its rules of procedural default does not constitute a state court "adjudication on the merits." *See, e.g., Dretke v. Haley*, 541 U.S. 386 (2004) (not applying § 2254(d)(1) to resolution of propriety of state imposition of procedural default). The specific question presented by Mr. Medellín's petition here is whether Texas's application of its contemporaneous objection rule is permissible in light of the *Avena* Judgment. Section 2254(d)(1) by its own terms does not apply to federal habeas review of that question, which is not "on the merits."

Finally, the state court's adjudication of whether Mr. Medellín had an individual right under article 36 applied an erroneous legal rule that treaties *can never* confer individual rights. P.A. 56a, ¶ 15 (citing *Hinojosa v. State*, 4 S.W.3d 240 (Tex. Crim. App. 1999)). The *Hinojosa* case had stated in *dicta* that treaties "generally" did not confer individual rights. 4 S.W.3d at 252. The state courts in the present case, however, expanded *Hinojosa* to establish—with no analysis of the terms of the Vienna Convention—a blanket rule that individuals could not raise treaty claims, contrary to over 200 years of Supreme Court precedent. *See, e.g.*, Pet'r Br. at 26-29. As this Court has made clear, "[a] state-court decision will certainly be contrary to our clearly established precedent if the state court applies a rule that contradicts the governing law set forth in our cases." *Williams (Terry) v. Taylor*, 529 U.S. 362, 405 (2000).[29]

Respondent also cites the rule of retroactivity set forth in *Teague v. Lane*, 489 U.S. 288 (1989). Again, this is beyond the scope of the questions presented in the Petition and the issues decided by the Court of Appeals. *See Lambrix v. Singletary*, 520 U.S. 518, 524 (1997) (procedural default issues should be decided before *Teague* issues). Furthermore, *Teague* does not apply because the *Avena* Judgment is a new *fact* giving rise to rights under existing law, not a new constitutional *rule* promulgated by this Court. *See Teague*, 489 U.S. at 310; *see also Breard*, 523 U.S. at 380 (Breyer, J., dissenting). In any event, as a prudential rule governing the exercise of judicial power under statutory provisions predating the Vienna Convention, *Teague* fares no better than the procedural default rule in the face of a controlling subsequent treaty provision. *See* Pet'r Br. 40-41. Respondent's citation to *Teague* therefore adds nothing.

For all of these reasons, at a minimum, "reasonable jurists" could find it "debatable" that the requirements of § 2254(d)(1) are satisfied and *Teague* poses no bar. *See Miller-El*, 537 U.S. at 335. The Court of Appeals therefore should have granted a COA.

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[28] *Monroe v. Angelone*, 323 F.3d 286, 297 (4th Cir. 2003); *Cargle v. Mullin*, 317 F.3d 1196, 1206-07 (10th Cir. 2003); *Daniels v. Lee*, 316 F.3d 477, 487 (4th Cir. 2003); *Killian v. Poole*, 282 F.3d 1204, 1207 (9th Cir. 2002); *Brown v. Maloney*, 267 F.3d 36, 40 (1st Cir. 2001).

[29] Respondent also asserts that the state court's determination of this issue "flowed directly from the Court's holding in *Breard*." Resp. Br. at 11. Nothing in *Breard*, however, overruled this Court's long line of precedents holding that treaties can create individual rights. To the contrary, *Breard* pointed out that the Vienna Convention "arguably creates individual rights." *Breard*, 523 U.S. at 376. The state court reached precisely the opposite conclusion. P.A. 56a.

CONCLUSION

For the foregoing reasons, Petitioner respectfully submits that the Court should (1) stay proceedings in this case pending completion of proceedings in the courts of Texas pursuant to the President's determination,[30] or (2) if it proceeds, hold that the *Avena* Judgment supplies the rule of decision with respect to the questions decided by the Court of Appeals, and remand the case either with directions to issue a COA or for further proceedings on the COA application consistent with this Court's opinion.

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[30] *See Ex parte Soffar*, 143 S.W.3d 804, 804 (Tex. Crim. App. 2004) (modifying prior practice to allow state court to entertain habeas petition where federal court stays parallel habeas proceedings). If the Court decides that it should stay its hand in light of the President's determination, a dismissal of certiorari would not be appropriate, because it would leave in place the judgment of the Court of Appeals, which this Court had already determined warrants review, and which the President's determination now fatally undermines. It would be unfair to Mr. Medellín, subversive of this Court's authority, and inefficient to require further proceedings to adjudicate what effects, if any, that judgment would have if and after certiorari were dismissed solely because Mr. Medellín's case was pending before this Court when the President issued his determination.

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In the Supreme Court of the United States

JOSE ERNESTO MEDELLIN, PETITIONER

v.

DOUG DRETKE, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTIONS PRESENTED

The United States will address the following questions:

1. Whether petitioner can make the "substantial showing of the denial of a constitutional right" (28 U.S.C. 2253(c)) necessary to obtain a certificate of appealability, in light of the fact that petitioner seeks to appeal the denial of a treaty claim, rather than a constitutional claim, and he cannot make a substantial showing that the state court's ruling rejecting his claim was contrary to, or an unreasonable application of, a Supreme Court precedent.

2. Whether the Vienna Convention on Consular Relations gives a foreign national a judicially enforceable right to challenge his conviction and sentence on the ground that he was denied consular assistance, and requires a state court to consider that claim, notwithstanding the foreign national's procedural default by failing to raise the claim at trial or on direct appeal in the state courts.

3. Whether the decision of the International Court of Justice in *Avena*, 2004 I.C.J. 128 (Mar. 31), that petitioner is entitled to "review and reconsideration" of his conviction and sentence establishes, by itself, a rule of decision in petitioner's case.

4. Whether the President's determination, pursuant to the United Nations Charter and his foreign affairs authority, that the *Avena* decision is enforceable in state court, in accordance with principles of comity and without respect to state rules of procedural default, is valid.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

INTEREST OF THE UNITED STATES

This case presents a claim by a Mexican national, proceeding on federal habeas corpus, to have the courts of the United States enforce a determination by the International Court of Justice (ICJ) that his rights under the Vienna Convention on Consular Relations (Vienna Convention) were violated and that he is entitled to review and reconsideration of his state conviction and capital sentence. The United States is party to the Vienna Convention. The United States is also party to the Charter of the United Nations, 59 Stat. 1031, T.S. No. 993 (1945), and thus is party to the Statute of the ICJ, 59 Stat. 1055, T.S. No. 993, U.N. Charter Art. 93(1); ICJ Statute Art. 1. The President, through subordinate

Executive Branch officials, represents the United States in ICJ proceedings and in the United Nations (U.N.), and he has the lead role in determining whether, and if so, how, to comply with the determinations of such international bodies. The United States also has a substantial interest in the interpretation and effect given to international instruments to which it is a party. At the invitation of the Court, the United States filed a brief addressing similar issues in *Breard* v. *Greene*, 523 U.S. 371 (1998) (per curiam).

STATEMENT

1. *The Vienna Convention.* In 1969, with the advice and consent of the Senate, see 115 Cong. Rec. 30,997, the President ratified the Vienna Convention, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261. Article 36 of the Vienna Convention, 21 U.S.T. 100-101, 596 U.N.T.S. 292-293, is designed to "facilitat[e] the exercise of consular functions relating to nationals of the sending State." Toward that end, Article 36 provides that "consular officers shall be free to communicate with nationals of the sending State and to have access to them." Vienna Convention Art. 36(1)(a).

Article 36 further provides that "[i]f he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner." Vienna Convention Art. 36(1)(b). In addition, "[a]ny communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay." *Ibid.* State authorities "shall inform the person concerned without delay of his rights under [Article 36]." *Ibid.*

Article 36 also provides that "consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation." Vienna Convention Art. 36(1)(c). It specifies that consular officers also "have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment." *Ibid.* At the same time, it provides that "consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action." *Ibid.*

The rights referred to in Article 36(1) "shall be exercised in conformity with the laws and regulations of the receiving State." Vienna Convention Art. 36(2). That requirement "is subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended." *Ibid.*

An Optional Protocol to the Vienna Convention, which the President also ratified in 1969, 21 U.S.T. 77, provides that "disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice." Optional Protocol Concerning the Compulsory Settlement of Disputes Art. I, 21 U.S.T. 326, 596 U.N.T.S. 488. Any party to the Optional Protocol may bring such disputes before the International Court of Justice. *Ibid.*

2. *State Court Proceedings.* a. Petitioner, a Mexican national who has continually resided in the United States since his pre-school years, was a member of the "Black and Whites" street gang. Pet. App. 4a, 46a. On the night of June 24, 1993, petitioner and fellow gang members gathered to initiate a new member. *Ibid.* That same night, 14-year-old Jennifer Ertman and 16-year-old Elizabeth Pena encountered the gang members. *Ibid.* As the girls passed by, petitioner attempted to engage Elizabeth in conversation. *Ibid.* When Elizabeth tried to run from him, petitioner grabbed

her and threw her to the ground. *Ibid.* When Jennifer tried to assist Elizabeth, gang members grabbed her and threw her to the ground. *Ibid.* Petitioner and several other gang members then brutally raped each of the girls. *Id.* at 5a. To conceal the rapes, the gang members killed both girls and discarded their bodies in a wooded area. *Id.* at 5a-6a. Petitioner strangled at least one of the girls. *Id.* at 6a.

After a trial, petitioner was convicted of capital murder, and the jury recommended a death sentence. Consistent with the jury's recommendation, the district court sentenced petitioner to death. Petitioner, who had the assistance of counsel, did not assert any claim under the Vienna Convention at trial or at sentencing.

The Texas Court of Criminal Appeals affirmed petitioner's conviction and sentence. Pet. App. 1a-31a. Petitioner raised numerous issues on appeal, but he did not raise a Vienna Convention claim.

b. In post-conviction state court proceedings, petitioner claimed for the first time that the failure to inform him of his rights under the Vienna Convention required reversal of his conviction and sentence. The state trial court rejected that claim on four grounds. First, the court held that, because petitioner failed to raise that claim at trial, petitioner was procedurally barred from raising it in post-conviction proceedings. Pet. App. 55a-56a. Second, the court held that petitioner had failed to show that he was a foreign national. *Id.* at 56a. Third, the court held that, as a private individual, petitioner lacked standing to enforce the Vienna Convention. *Ibid.* Finally, the court held that petitioner failed to show that he was harmed by the alleged Vienna Convention violation because he was "provided with effective legal representation" and his "constitutional rights were safeguarded." *Id.* at 56a-57a. Finding the trial court's findings and conclusions supported by the record, the Texas Court of Criminal Appeals summarily affirmed. *Id.* at 32a-33a.

3. *The Federal District Court's Decision On Habeas.* Petitioner then filed a petition for a writ of habeas corpus in federal district court, claiming that he was not informed of his rights under the Vienna Convention and that he was therefore entitled to a new trial. Pet. App. 79a. The district court rejected that claim. *Id.* at 79a-85a. The court first held that petitioner's failure to raise his Vienna Convention claim at trial in accordance with the State's contemporaneous objection rule constituted an adequate and independent state ground barring federal habeas court review. *Id.* at 79a-82a. In reliance on *Breard* v. *Greene*, 523 U.S. 371, 375-376 (1998) (per curiam), the district court rejected petitioner's claim that Vienna Convention claims are exempt from the procedural default doctrine. Pet. App. 80a-81a.

The district court also rejected petitioner's argument that it should follow the intervening decision of the ICJ in *Federal Republic of Germany* v. *United States*, 2001 I.C.J. 466 (June 27) (*LaGrand*). In that case, the ICJ "conclude[d] that Article 36, paragraph 1, creates individual rights, which, by virtue of Article I of the Optional Protocol, may be invoked in this Court by the national State of the detained person." *Id.* ¶ 77, at 493. The ICJ further concluded that the application of procedural default to preclude the LaGrands from challenging their convictions and sentences violated Article 36(2) because it "had the effect of preventing 'full effect [from being] given to the purposes for which the rights accorded under this article are intended.'" *Id.* ¶ 91, at 497-498. The district court refused to follow the *LaGrand* court's procedural default ruling on the ground that it conflicted with *Breard.* Pet. App. 82a.

The district court further held that, even if petitioner could surmount his procedural default, he would not be entitled to relief. Pet. App. 82a. The court explained that the state court's ruling that private individuals lack standing to enforce the Vienna Convention was consistent with controlling Fifth Circuit precedent, and that the announcement of a new rule that the Vienna Convention creates judicially enforceable rights would be barred on habeas review under *Teague* v. *Lane*, 489 U.S. 288 (1989). Pet. App. 82a- 83a.

Finally, the district court held that, even if procedural default and non-retroactivity principles did not bar petitioner's claim, and even if petitioner had standing to assert a Vienna Convention claim, *Breard* would require petitioner to establish that the denial of his Vienna Convention rights caused "concrete, non-speculative harm." Pet. App. 84a. The district court concluded that the state habeas court's determination that he had failed to make such a showing was not "contrary to, or an unreasonable application of, federal law." *Id.* at 84a-85a (citing 28 U.S.C. 2254(d)(1)). The court therefore denied petitioner's claim for habeas relief as well as his application for a certificate of appealability (COA). *Id.* at 59a, 118a.

4. *The ICJ's Decision In* Avena. While petitioner's application for a COA was pending in the Fifth Circuit, the ICJ issued its decision in *Mexico* v. *United States*, 2004 I.C.J. 128 (Mar. 31) (*Avena*) (Pet. App. 174a-274a). In that case, Mexico alleged violations of the Vienna Convention with respect to a number of Mexican nationals facing the death penalty, including petitioner. As in *LaGrand*, the ICJ concluded that Article 36(1)(b) gives detained foreign nationals individual rights that the national's State may invoke in a proceeding before the ICJ. Pet. App. 214a, para. (40). The ICJ further found that the United States had violated Article 36(1)(b) by not informing 51 Mexican nationals, including petitioner, of their Vienna Convention rights, and by not notifying consular authorities of the detention of 49 Mexican nationals, including petitioner. *Id.* at 271a, paras. (4) and (5). The ICJ made additional findings with respect to violations of Mexico's rights under Article 36(1)(a) and (c). *Id.* at 271a-272a, paras. (6) and (7). The ICJ found that the appropriate remedy "consists in the obligation of the United States of America to provide, by means of its own choosing, review and reconsideration of the convictions and sentences of the [affected] Mexican nationals, * * * by taking into account * * * paragraphs 138 to 141 of this Judgment." *Id.* at 273a, para. (9).

In paragraph 143, the ICJ found "that the clemency process, as currently practiced within the United States criminal justice system, does not appear to meet the requirements described in paragraph 138 above and that it is therefore not sufficient in itself to serve as an appropriate means of 'review and reconsideration' as envisaged by the Court." Pet. App. 263a. In paragraph 140, the ICJ specified that it "considers that it is the judicial process that is suited to this task." *Id.* at 262a. In paragraph 121, the ICJ made clear that it did not prescribe a particular outcome for the review and reconsideration, but instead specified that it was for the United States to determine in each case whether the violation of Article 36 "caused actual prejudice to the defendant in the process of administration of criminal justice." *Id.* at 253a. In paragraph 139, the ICJ made clear that the prejudice inquiry must give "full weight to violation of the rights set forth in the Vienna Convention," and must be separate from an inquiry whether the defendant experienced harm cognizable as a violation of due process under the United States Constitution. *Id.* at 261a-262a.

5. *The Court Of Appeals' Decision.* The court of appeals denied petitioner's application for a COA. Pet. App. 119a-135a. The court first held that petitioner had defaulted on his Vienna Convention claim by failing to raise it at trial. *Id.* at 131a. The court was unwilling to excuse petitioner's default based on the ICJ's decisions in *Avena* and *LaGrand*. *Id.* at 131a-132a. The court concluded that, while *Avena* and *LaGrand* were decided after *Breard*, it was not free to

disregard *Breard's* holding "that ordinary procedural default rules bar Vienna Convention claims." *Id.* at 132a.

The court of appeals also held that petitioner could not prevail on the merits. Pet. App. 132a-133a. The court explained that a prior Fifth Circuit panel had "held that Article 36 of the Vienna Convention does not create an individually enforceable right." *Id.* at 133a. After noting that the ICJ had concluded that the Vienna Convention creates individual rights, the court held that it was "bound to apply" its own precedent "until either the [Fifth Circuit] sitting *en banc* or the Supreme Court say otherwise." *Ibid.*

SUMMARY OF ARGUMENT

Petitioner seeks a holding from this Court that the ICJ's *Avena* decision is the product of a binding treaty obligation, giving him a judicially enforceable right to review and reconsideration of his conviction and sentence; alternatively, he asks that *Avena* be enforced as a matter of comity. This Court should not address those claims. Petitioner, who was denied a writ of habeas corpus in federal district court, requires a certificate of appealability in order to pursue the merits of his claims on appeal. He is, however, jurisdictionally barred from obtaining a COA. First, a COA may be obtained only for constitutional claims, not for treaty claims. Second, a COA may not issue in this case because petitioner cannot meet the Antiterrorism and Effective Death Penalty Act requirement to show that the state court's denial of relief was contrary to, or an unreasonable application of, any holding of this Court. To the contrary, the state court's decision was consistent with this Court's decision in *Breard*. The Court should therefore either affirm the judgment below or dismiss the writ as improvidently granted.

Should the Court reach the merits, it should reject petitioner's reliance on international treaties and the ICJ's decision as free-standing sources of law under which he can obtain judicial review and reconsideration of his conviction and sentence. Neither the Vienna Convention, the Optional Protocol, nor the U.N. Charter—the relevant treaties at issue—provides petitioner with judicially enforceable private rights. Article 36 of the Vienna Convention confers no private, judicially enforceable rights, and the ICJ decision, standing alone, establishes solely an international obligation for the United States. It is for the President, not the courts, to determine whether the United States should comply with the decision, and, if so, how.

In this case, the President, the nation's representative in foreign affairs, has determined that the United States will comply with the ICJ decision. Compliance serves to protect the interests of United States citizens abroad, promotes the effective conduct of foreign relations, and underscores the United States' commitment in the international community to the rule of law. Accordingly, in the exercise of his constitutionally based foreign affairs power, and his authority under the United Nations Charter, the President has determined that compliance should be achieved by the enforcement of the ICJ decision in state courts in accordance with principles of comity. That presidential determination, like an executive agreement, has independent legal force and effect, and contrary state rules must give way under the Supremacy Clause.

In accordance with the President's determination, petitioner can seek review and reconsideration of his Vienna Convention claim, without regard to state law doctrines of procedural default, by filing an appropriate action in state court for enforcement of the ICJ's decision under principles of comity. State courts will then provide the review and reconsideration that the President has determined is an appropriate means to fulfill this nation's treaty obligations.

ARGUMENT

PETITIONER'S CLAIM BASED ON THE DECISION OF THE INTERNATIONAL COURT OF JUSTICE DOES NOT ENTITLE HIM TO RELIEF IN THIS CASE

I. THE COURT OF APPEALS CORRECTLY REFUSED TO ISSUE A CERTIFICATE OF APPEALABILITY

Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), a state prisoner may not appeal from a district court decision denying habeas relief "[u]nless a circuit justice or judge issues a certificate of appealability". 28 U.S.C. 2253(c)(1). Petitioner was denied a COA by the court of appeals. The denial of a COA was correct and compelled by provisions of the AEDPA.

A. The COA Requirement Is Jurisdictional

Obtaining a COA is a "jurisdictional prerequisite" to an appeal. *Miller-El* v. *Cockrell*, 537 U.S. 322, 336 (2003). A COA may issue only when a petitioner has made a "substantial showing of the denial of a constitutional right." 28 U.S.C. 2253(c)(2). Under that standard, the petitioner must show that "reasonable jurists could debate (or, for that matter agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Slack* v. *McDaniel*, 529 U.S. 473, 484 (2000) (citation omitted). That analysis must take into account the AEDPA's standards for granting relief. An appellate court "looks to the District Court's application of AEDPA to petitioner's constitutional claims and ask[s] whether that resolution was debatable amongst jurists of reason." *Miller-El*, 537 U.S. at 336. Thus, "[a] circuit justice or judge must deny a COA, even when the habeas petitioner has made a substantial showing that his constitutional rights were violated, if all reasonable jurists would conclude that a substantive provision of the federal habeas statute bars relief." *Id.* at 349-350 (Scalia, J., concurring).

This Court has jurisdiction under 28 U.S.C. 1254 to review a court of appeals' denial of a COA. *Hohn* v. *United States*, 524 U.S. 236, 254 (1988). In such a case, the question before the Court is the same as the question before the court of appeals—whether, in light of the AEDPA's limitations, the petitioner has a made a substantial showing of the denial of a constitutional right. See *Miller-El*, 537 U.S. at 336. The Court resolves only that threshold question; it does not resolve the merits of the claim. *Id.* at 348.

In this case, petitioner seeks to bypass that threshold question in order to obtain this Court's ruling on the merits of his claim that the Vienna Convention, as interpreted by the ICJ in *Avena* and *LaGrand*, requires review and reconsideration of his conviction and sentence. That claim, however, is not properly presented. Instead, the question properly presented is whether petitioner satisfied the requirements for the issuance of a COA. Because the COA requirement is jurisdictional, this Court must address whether a COA may issue, regardless of whether or not objections to its issuance were properly preserved.[1]

Jurisdictional prerequisites may not be waived by the parties. *Mansfield, Coldwater & Lake Mich. Ry.* v. *Swan*, 111 U.S. 397, 382 (1984). And a substantial showing of a denial of a "constitutional" right (28 U.S.C. 2253(c)(2)) is a prerequisite for issuance of a COA. Because the issuance of a COA is jurisdictional, *Miller-El*, 537 U.S. at 336, it follows that the necessary predicate for obtaining a COA—a substantial showing of a denial of a constitutional right—is also jurisdictional. *United States* v. *Cepero*, 224 F.3d 256, 261-262 (3d Cir. 2000) (en banc), cert. denied, 531 U.S. 1114 (2001); cf. *Torres* v. *Oakland Scavenger Co.*, 487 U.S. 312, 315 (1988) (requirements in Federal Rule of Civil Procedure 3 (1976) on what a notice of appeal must contain are jurisdictional).[2]

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[1] In this case, respondent did not assert in the court of appeals or in his opposition to the petition for a writ of certiorari that a COA may not issue to review a treaty claim (see Section I(B), *infra*), although respondent did assert in the court of appeals that a COA could not issue because the state court's procedural default decision was not contrary to, or an unreasonable application of, Supreme Court precedent (see Section I(C), *infra*). See Resp. C.A. Opp. to App. for COA 36-39 (No. 03-20687).

For two reasons, petitioner failed to make the required showing. First, petitioner seeks to appeal a claim based on a treaty, not the denial of any "constitutional" right. 28 U.S.C. 2253(c). Second, the state court decision that petitioner challenges was not contrary to, or an unreasonable application of, clearly established federal law as determined by this Court. 28 U.S.C. 2254(d)(1). Those substantive limits bar issuance of a COA and require that the court of appeals' judgment be affirmed.

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[2] Some courts of appeals have held that, once a COA has been issued, they have jurisdiction to decide non-constitutional claims. See, *e.g.*,*Young* v. *United States*, 124 F.3d 794, 799 (7th Cir. 1997), cert. denied, 524 U.S. 928 (1998); *United States* v. *Talk*, 158 F.3d 1064, 1068 (10th Cir. 1998), cert. denied, 525 U.S. 1164 (1999); *Soto* v. *United States*, 185 F.3d 48, 52 (2d Cir. 1999). Those courts have reasoned that addressing the merits can promote the conservation of judicial resources. Congress, however, has determined that judicial resources are best conserved when habeas appeals are limited to cases where a petitioner can make a substantial showing of the denial of a constitutional right. In any event, in this case, no certificate of appealability has been issued, and the absence of a substantial constitutional question is apparent. In those circumstances, the assertion of a treaty claim, rather than a constitutional claim may not be overlooked. Nor can a court overlook the substantive standards of the AEDPA and issue a COA on a claim that is clearly precluded by those standards.

B. A COA May Not Issue To Review A Claimed Denial Of A Treaty Right

1. Petitioner claims a denial of a treaty right, not a constitutional right, and a COA may issue only to review a claimed denial of a constitutional right. While a federal district court has jurisdiction to entertain a habeas petitioner's claim that he "is in custody in violation of *the Constitution or laws or treaties of the United States*," 28 U.S.C. 2254(a) (emphasis added), a COA may issue only when a petitioner has made a "substantial showing of the denial of a *constitutional right*." 28 U.S.C. 2253(c)(2) (emphasis added). Because petitioner's habeas claim is based on an alleged violation of a treaty, the district court had jurisdiction to entertain it. But since a treaty right is not a "constitutional right," a COA may not issue to review the district court's resolution of petitioner's treaty claim. See *Breard* v. *Greene*, 523 U.S. 371, 376 (1998) (1998) (per curiam) (a treaty has the same status as a federal statute).

The background to the AEDPA confirms that a COA may issue to review only a constitutional claim, and that claims based on other sources of federal law, such as federal statutes and treaties, are not appealable. Under pre-AEDPA law, a state petitioner was required by statute to obtain a certificate of probable cause (CPC) in order to appeal. The statute did not specify the standard for obtaining a CPC, but the Court held in *Barefoot* v. *Estelle*, 463 U.S. 880, 893 (1983), that a CPC could be obtained only if the petitioner could make a "substantial showing of the denial of [a] *federal* right" (emphasis added). The AEDPA codifies the *Barefoot* standard, except that it "substitut[es] the word 'constitutional' for the word 'federal.'" *Slack*, 529 U.S. at 483. Thus, before the AEDPA, a state petitioner could appeal any "federal" claim—whether it was based on the Constitution, a law, or a treaty. Under the AEDPA, however, a petitioner may appeal only a "constitutional" claim; a petitioner may not appeal a claim based on a federal statute, a federal rule, or a treaty.[3]

2. The AEDPA's requirement that a petitioner seeking a COA must make a substantial showing of a denial of a "constitutional right" (28 U.S.C. 2253(c)(2)) cannot be circumvented by characterizing an alleged treaty right as a constitutional right under the Supremacy Clause. The Supremacy Clause "'is not a source of any federal rights'; it 'secure[s] federal rights by according them priority whenever they come in conflict with state law.'" *Golden State Transit Corp.* v. *City of Los Angeles*, 493 U.S. 103, 107 (1989) (quoting *Chapman Houston Welfare Rights Org.*, 441 U.S. 600, 613 (1979)). If the term "constitutional" right encompassed a treaty right, it would render superfluous the terms "laws and treaties" in the provision granting federal district courts jurisdiction to entertain habeas claims, see 28 U.S.C. 2254(a), and it would fail to give effect to Congress's substitution of the word "constitutional" for the word "federal" in defining the claims that may be reviewed on appeal. See *Slack*, 529 U.S. at 483. The Court has refused to treat a claim arising under the Supremacy Clause as a claim arising under the Constitution in comparable circumstances. *Golden State*, 493 U.S. at 107 & n.4 (right secured by the Supremacy Clause is not a right "secured by the Constitution" under 42 U.S.C. 1983); *Chapman*, 441 U.S. at 614-615 (right secured by the Supremacy Clause is not a right "secured by the Constitution" under 28 U.S.C. 1343); *Swift & Co.*, v. *Wickham*, 382 U.S. 111, 126-127 (1965) (injunction sought on the ground that a state statute violates the Supremacy Clause is not sought "upon the ground of the unconstitutionality of such statute" within the meaning of 28 U.S.C. 2281 (1958)).

Thus, "the Supremacy Clause does not convert violations of treaty provisions (regardless of whether those provisions can be said to create individual rights) into violations of *constitutional* rights." *Murphy* v. *Netherland*, 116 F.3d 97, 100 (4th Cir.), cert. denied, 521 U.S. 1144 (1977). "Just as a state does not violate a constitutional right merely by violating a federal statute, it does not violate a constitutional right merely by violating a treaty." *Ibid.* A COA therefore may not be issued to review petitioner's Vienna Convention claim. *Ibid.*

C. Petitioner Failed To Make A Substantial Showing That The State Court's Resolution Of His Vienna Convention Claim Was Contrary To, Or An Unreasonable Application Of, Controlling Supreme Court Precedent

Even if a treaty right could be treated as a constitutional right, petitioner could not satisfy the AEDPA's standards for awarding relief. The state habeas court denied relief on two grounds at issue here—that the Vienna Convention did not excuse petitioner's procedural default, and that the Vienna Convention does not create individual rights enforceable in a criminal proceeding. Pet. App. 55a-56a. Under the AEDPA, those rulings stand as a barrier to habeas relief unless the state court rulings were "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. 2254(d)(1). Accordingly, to obtain a COA, petitioner must show that it is at least reasonably "debatable" that the state court's rulings were contrary to, or an unreasonable application of controlling Supreme Court law. See *Miller-El*, 537 U.S. at 335. In seeking to make that showing, petitioner may rely only on decisions of this Court "as of the time of the relevant state-court decision," and only on the "holdings, as opposed to the dicta" of those decisions. *Williams* v. *Taylor*, 529 U.S. 362, 412 (1999).

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[3] The courts of appeals have uniformly reached that conclusion. See *Young* v. *United States*, 124 F.3d 794, 798-799 (7th Cir.) (COA may not issue to review statutory claim), cert. denied, 524 U.S. 928 (1998); *Murphy* v. *Netherland*, 116 F.3d 97, 99-100 (4th Cir.) (COA may not issue to review treaty claim), cert. denied, 521 U.S. 1144 (1977). See also *United States* v. *Vargas*, 393 F.3d 172, 175 (D.C. Cir. 2004) (COA may not issue to review claim under Federal Rule of Civil Procedure 60(b)); *Marshall* v. *Hendricks*, 307 F.3d 36, 80-81 (3d Cir. 2002) (COA may not issue to review statutory claim), cert. denied, 538 U.S. 911 (2003); *United States* v. *Mikels*, 236 F.3d 550, 551 (9th Cir. 2000) (COA may not issue to review statutory claim); *United States* v. *Cepero*, 224 F.3d 256, 262-267 (3d Cir. 2000) (en banc) (COA may not issue to review claim under the Sentencing Guidelines), cert. denied, 531 U.S. 1114 (2001); *United States* v. *Gordon*, 172 F.3d 753, 754-755 (10th Cir. 1999) (COA may not issue to review claim under Federal Rule of Criminal Procedure 32).

At the time of the relevant state court decision, *Breard* was the controlling decision on the interaction between the Vienna Convention and state procedural default rules, and *Breard* had held that a State may apply its procedural default rules to Vienna Convention claims. 523 U.S. at 375-376. At that time, there was no holding from this Court on whether the Vienna Convention creates judicially enforceable individual rights. *Breard* was the only decision of the Court that had addressed that issue, and it had done so in inconclusive dicta, stating only that the Vienna Convention "arguably confers on an individual the right to consular assistance following his arrest." *Id.* at 376. The state court's rulings on procedural default and judicial enforceability therefore were not debatably in conflict with, or an unreasonable application of, any holding of this Court.

Petitioner argues (Br. 38-39) that the ICJ decisions in *Avena* and *LaGrand* hold that a State may not rely on procedural default rules to reject his Vienna Convention claim, and that those decisions, rather than *Breard*, should be given effect. Petitioner also argues (Br. 37-39) that the ICJ decisions authoritatively hold that the Vienna Convention provides judicially enforceable individual rights. Whatever the merit of those contentions, they provide no reasonably debatable basis for obtaining relief under the AEDPA and therefore no ground for obtaining a COA. As discussed above, the applicable law for obtaining federal habeas relief is the law at the time of the state court's decision as reflected in holdings of this Court. *Williams*, 529 U.S. at 412. The *Avena* and *LaGrand* decisions were not issued until after the state court habeas ruling, and they are not decisions of this Court. Petitioner therefore cannot rely on them to obtain a COA.

In sum, because the state court procedural-default and judicial-enforceability rulings were not debatably in conflict with, or an unreasonable application of, holdings of this Court, petitioner cannot satisfy the threshold requirement for obtaining a COA. Thus, even assuming that a COA may issue to review a treaty claim, a COA may not issue to review petitioner's treaty claim.

D. The ICJ Decisions Do Not Alter The Requirements For Obtaining A COA

The conclusion that petitioner cannot satisfy the requirements for obtaining a COA is not affected by the Vienna Convention or the ICJ decisions in *Avena* and *LaGrand* interpreting it. Neither the Convention nor the ICJ decisions interpreting it purport to override the AEDPA's requirements that a COA may issue only to review a constitutional claim and that a petitioner must make a threshold showing that his claim is debatable among jurists of reason in light of the AEDPA's standards for granting relief.

In any event, the AEDPA was enacted after the Vienna Convention, and a subsequently enacted statute takes precedence over a previously adopted treaty. *Breard*, 523 U.S. at 376. Accordingly, if there were a conflict, the AEDPA's unambiguous command would displace any contrary rule derived from the Vienna Convention or ICJ decisions interpreting it. *Ibid.*

Enforcement of the AEDPA's threshold requirement for obtaining a COA will not foreclose petitioner from seeking relief based on *Avena* and *LaGrand*. If, as petitioner argues, those decisions require reconsideration of his conviction and sentence as a matter of federal law, he may seek relief on that basis in state court. See *Torres* v. *State*, No. PCD-04-442 (Okla. Crim. App. May 13, 2004) (remanding case for evidentiary hearing on Vienna Convention claim). Should the state courts deny relief, petitioner could seek relief in this Court. Petitioner may not, however, obtain a COA to review his treaty claim, because he failed to satisfy the requirements for obtaining one.

For that reason, the Court should either affirm the court of appeals' judgment refusing to issue a COA or dismiss the writ of certiorari as improvidently granted. The Court should not resolve the questions on which it granted review. Because of their public importance, however, the government now addresses the merits of those questions. The government also sets forth the President's chosen means of complying with the *Avena* decision.

II. ARTICLE 36 OF THE VIENNA CONVENTION DOES NOT PROVIDE A BASIS FOR PETITIONER TO CHALLENGE HIS CONVICTION OR SENTENCE

For two reasons, Article 36 of the Vienna Convention does not provide petitioner with a basis for challenging his conviction or sentence. First, Article 36 does not give a foreign national a judicially enforceable right to challenge his conviction or sentence. And second, even if it did, procedural default rules would preclude consideration of petitioner's Article 36 claim.

A. Article 36 Does Not Authorize Private Judicial Enforcement

1. The Supremacy Clause provides that "all Treaties made, or which shall be made, under Authority of the United

States, shall be the supreme Law of the Land." U.S. Const. Art. VI, Cl. 2. Nonetheless, treaties in this country are negotiated against the background understanding that they do not generally create judicially enforceable individual rights. In general, "[a] treaty is primarily a compact between independent nations," and "depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it." *Head Money Cases*, 112 U.S. 580, 598 (1884). When a treaty violation nonetheless occurs, it "becomes the subject of international negotiations and reclamation," not judicial redress. *Ibid.* See *Charlton* v. *Kelly*, 229 U.S. 447, 474 (1913); *Whitney* v. *Robertson*, 124 U.S. 190, 194-95 (1888); *Foster* v. *Neilson*, 27 U.S. (2 Pet.) 253, 306 (1829) ("The judiciary is not that department of the government, to which the assertion of its interest against foreign powers is confided.").

Treaties can create judicially enforceable private rights, and when they do, they are supreme law. But since such treaties are the exception, rather than the rule, there is a presumption that a treaty will be enforced through political and diplomatic channels, rather than through the courts. *United States* v. *Emuegbunam*, 268 F.3d 377, 389-390 (6th Cir. 2001); *United States* v. *Jimenez-Nava*, 243 F.3d 192, 195-196 (5th Cir. 2001); *United States* v. *De la Pava*, 268 F.3d 157, 164 (2d Cir. 2001); *United States* v. *Li*, 206 F.3d 56, 61 (1st Cir. 2000).

That background principle applies even when a treaty benefits private individuals. "International agreements, even those directly benefitting private persons, generally do not create private rights or provide for a private cause of action in domestic courts." Restatement (Third) of the Foreign Relations Law of the United States § 907 cmt. a, at 395 (1987) (Restatement (Third) of Foreign Relations). For example, in *Argentine Republic* v. *Amerada Hess Shipping Co.*, 488 U.S. 428, 442 & n.10 (1989), the Court held that two conventions did not create judicially enforceable rights for ship owners, even though one specified that a merchant ship "shall be compensated for any loss or damage" in certain circumstances, and the other specified that "[a] belligerent shall indemnify the damage caused by its violation." The Court explained that the conventions "only set forth substantive rules of conduct and state that compensation shall be paid for certain wrongs." *Id.* at 442. "They do not create private rights of action for foreign corporations to recover compensation from foreign states in United States courts." *Ibid.* See *Johnson* v. *Eisentrager*, 339 U.S. 769, 789 & n.14 (1950) (protections of the Geneva Convention of July 27, 1929, 47 Stat. 2021, are not judicially enforceable).

2. Article 36(1)(b) of the Vienna Convention specifies that "if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested." 21 U.S.T. at 101. In addition, "[a]ny communication addressed to the consular post by the person arrested, * * * shall also be forwarded * * * without delay." *Ibid.* Finally, state authorities "shall inform the person concerned without delay of his rights under [Article 36(1)(b)]." *Ibid.*

Nothing in the Vienna Convention provides that the "rights" specified in Article 36(1)(b) may be privately enforced in a criminal proceeding. Accordingly, consistent with background principles, the State of the foreign national may protest the failure to observe the terms of Article 36 and attempt to negotiate a solution. And if both parties have subscribed to the Optional Protocol, a resolution may be sought from the ICJ. But a foreign national does not have a private right to seek to have his conviction or sentence overturned.

Other Vienna Convention clauses reinforce that conclusion. The Vienna Convention's preamble states that "the purpose of [the] privileges and immunities [created by the treaty] is not to benefit individuals, but to ensure the efficient performance of functions by consular posts." 21 U.S.T. at 79. And the introductory clause to Article 36 states that it was designed "[w]ith a view to facilitating the exercise of consular functions relating to nationals of the sending State." Those clauses show that "the purpose of Article 36 was to protect a *state's right* to care for its nationals." *De La Pava*, 268 F.3d at 165.

The structure of Article 36 confirms that understanding. The first protection extended is to consular officers, not to individual nationals: Article 36(1)(a) specifies that "consular officers shall be free to communicate with nationals of the sending State and to have access to them." The "rights" of foreign nationals are placed underneath, signaling what the introductory clause spells out—that the function of Article 36(1)(b) is not to create freestanding individual rights but to facilitate a foreign state's right to protect its nationals. Moreover, on a practical level, a foreign national's rights are necessarily subordinate to, and derivative of, his country's rights. An individual may ask for consular assistance, but it is entirely up to the foreign government whether to provide it. That nations may choose to enter into the Optional Protocol, providing an enforcement mechanism in the form of a suit by the offended Nation in the ICJ, underscores that the Treaty confers rights on, and envisions enforcement by, nations, not individuals.

3. The ratification history provides further evidence that Article 36 does not create private rights that may be enforced in a criminal proceeding. See *United States* v. *Stuart*, 489 U.S. 353, 366 (1989) (ratification history is relevant in interpreting treaty). The State Department informed the Senate that "[t]he Vienna Convention does not have the effect of overcoming Federal or State laws beyond the scope long authorized in existing consular conventions." S. Exec. Rep. No. 9, 91st Cong., 1st Sess. 18 (1969). The Senate For-

eign Relations Committee, in turn, cited as a factor in its endorsement of the treaty that "[t]he Convention does not change or affect present U.S. laws or practice." *Id.* at 2. And following ratification of the Vienna Convention, the State Department wrote a letter to all 50 governors explaining it would not require "significant departures from the existing practice within the several states of the United States." *Li*, 206 F.3d at 64. That series of statements would not have been made if the Convention were understood to have given a criminal defendant a private right to challenge his conviction and sentence on the ground that he was not informed as required by Article 36. See Letter from David Andrews, Legal Adviser, Department of State, to James K. Robinson, Assistant Attorney General, Criminal Division, Department of Justice, Re: *United Stats* v. *Li*, No. 97-2034 (1st Cir.) (Oct. 15, 1999); *id.* App. A Department of State Answers to Questions Posed by the First Circuit in *United States* v. *Nai Fook Li* at A9 (State Department Answers).[4]

4. The Executive Branch's interpretation of Article 36 "is entitled to great weight." *Stuart*, 489 U.S. at 369 (quoting *Sumitomo Shojo Am. Inc.* v. *Avagliano*, 457 U.S. 176, 184-185 (1982)). The Executive Branch has never interpreted the Vienna Convention to give a foreign national a

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[4] The State Department Answers noted (at A9) that in 1970, the Legal Adviser wrote letters to all fifty states stating that "[w]e do not believe that the Vienna Convention will require significant departures from existing practice within the several states of the United States," and then explained that "[w]e believe that such a statement would not have been made if the Department of State had contemplated that the VCCR might require that failures of consular notification be remedied in the criminal process through prejudice hearings, and possibly the suppression of evidence or the undoing of other aspects of the criminal process." The State Department's letter is available at U.S. Dep't of State, *Digest of United States Practice in International Law 2000*, (last visited Feb. 28, 2005) ch. 2, doc. no. 1, <http://www.state.gov/documents/organization/7111.doc>.

judicially enforceable right to challenge his conviction and sentence. The United States advised the Court of that interpretation in its brief in *Breard*, Brief for the United States at 18-23, *Republic of Paraguay* v. *Gilmore*, 523 U.S. 371 (1998) (No. 97-1390), and *Breard* v. *Greene*, 523 U.S. 371 (1998) (No. 97-8214), and the State Department later reiterated that interpretation in the State Department Answers to the First Circuit's questions in *Li*.

The State Department's interpretation accords with both its practice in enforcing the Vienna Convention and the practice of other parties to the Convention. See *Stuart*, 489 U.S. at 366 ("subsequent operation" of treaty is relevant in interpreting it). The State Department's longstanding practice has been to investigate a country's complaint about the absence of notification. When a violation has been confirmed, the State Department has extended a formal apology to that country's government and sought to prevent a recurrence through educational efforts. State Department Answers A3. It is the State Department's understanding that "this is how consular notification issues have always been handled by the United States under all of the consular conventions to which it is a party, and in situations governed by customary international law." *Id.* at A2-A3. In cases involving the death penalty (and in one other context), the Department has also requested that the violation be considered in clemency.[5]

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[5] The United States has also taken substantial measures to implement the Vienna Convention obligation to advise foreign detained nationals that they may contact their consuls. The Department of State publishes and has placed on a public website <http://travel.state.gov/law/consular/consular_636.html>, "Instructions for Federal, State, and other Local Law Enforcement and Other Officials Regarding Foreign Nationals in the United States and the Rights of Consular Officials to Assist Them," including 24-hour contact telephone numbers that law enforcement personnel can use to obtain advice and assistance. The Department of State

The State Department's experience abroad has been that foreign governments also usually address complaints about the failure of notification by investigating and extending apologies where appropriate. State Department Answers, at A3. As of 1999, the State Department was not aware of any foreign country that had remedied failures of notification through the criminal justice process. *Id.* at A1, A8. While the Convention has been in force for more than three decades, surveys of state practice have uncovered only seven cases that even touched on the issue, even though more than 160 countries are party to the Vienna Convention. None of these cases has unambiguously endorsed a judicially enforceable individual right to attack a conviction.[6]

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also publishes the "Instructions" as a Consular Notification and Access booklet, publishes a Consular Notification Pocket Card for police pocket use that has the Vienna Convention consular notification warning, and publishes a 2-foot by 3-foot wall poster containing the consular notification in many languages (Arabic, Chinese, Cambodian, Creole, English, Farsi, French, German, Italian, Japanese, Korean, Lao, Polish, Portuguese, Russian, Spanish, Thai, and Vietnamese) (see <http://travel.state.gov/law/info/info_626.html>) that police can post in their facilities. The State Department regularly communicates with the States and law enforcement authorities about ensuring compliance with the consular notification requirements of the Convention.

[6] See *R.* v. *Abbrederis* (June 26, 1981), Australian Case (A1987, A1995) (rejecting remedy); see also *In re Yater*, Italian Case (1973) (A1999) (addressing only Article 36(c), allowing consul to arrange legal representation); *R.* v. *Van Axel & Wezer*, British Case (1991) (A2006); *R.* v. *Bassil & Mouffareg*, British Case (1990) (A2008) (both noting lack of consular notification, but suppressing confessions based on domestic British law). Two other cases addressing the issue before denying relief were a Canadian case, *Regina* v. *Partak* (Oct. 31, 2001) (A1964), which seemed only to have assumed the existence of a judicially cognizable right, and a German case (Nov. 7, 2001) (A1956), which seemed to equate the rights conferred by the Vienna Convention with the rights accorded to Germans, *i.e.*, a right not to be held incommunicado. (All citations are to the Annexes to the Counter-Memorial of the United States in *Avena*.) State

Finally, the government's interpretation of the Vienna Convention is consistent with how the United States has interpreted identical language found in other treaties. For example, the International Convention for the Suppression of the Financing of Terrorism, Jan. 10, 2000, S. Treaty Doc. No. 49, 106th Cong., 2d Sess. (2000) (Terrorist Financing Convention), and the International Convention for the Suppression of Terrorist Bombings, Jan. 12, 1978, S. Treaty Doc. No. 6, 106th Cong., 1st Sess. (1999) (Terrorist Bombing Convention), provide:

> 3. Any person [detained in connection with terrorist financing] shall be entitled to: (a) Communicate without delay with the nearest appropriate representative of [his] State * * * ; (b) Be visited by a representative of that State; (c) Be informed of *that person's rights* under subparagraphs (a) and (b).
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> 4. The *rights* referred to in paragraph 3 shall be exercised in conformity with the laws and regulations of the State in the territory in which the offender or alleged offender is present, subject to the provision that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under paragraph 3 are intended.

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practice thus shows a glaring absence of private judicial remedies in criminal cases for failures of consular notification. The United States also submitted the declaration in *Avena* of Assistant Secretary of State Maura Hardy (App. A375), analyzing state practice. Hardy concluded that "[b]reaches of Article 36 do not appear to have been raised often in national courts," and that while in some states "criminal defendant might be able to raise violations of Article 36 on appeal, our consular officers, and the local lawyers and government officials that they consulted, doubted the appeals would succeed, particularly if the defendant could not demonstrate that he was prejudiced by the violation." App. A387.

Terrorist Financing Convention, Arts. 9.3-9.4, S. Treaty Doc. No. 49, *supra*, a 7-8 (emphasis added); see also Terrorist Bombings Convention, Art. 7.3, S. Treaty Doc. No. 6, *supra*, at 7-8. In its transmittal package, the Executive Branch explained that this language "like the Convention as a whole as well as other similar counterterrorism conventions, is not intended to create individual rights of action." Transmittal Letter from State Department to President at 7a (Oct. 3, 2000).

5. In sum, Article 36 does not give a foreign national a private right to challenge his conviction and sentence based on an alleged denial of consular assistance. See *Jimenez-Nava*, 243 F.3d at 195-198; *Emuegbunam*, 268 F.3d at 391-394; see also *De La Palva*, 268 F.3d at 163-165; *Li*, 206 F.3d at 66-68 (Selya, J. and Boudin, C.J., concurring).

6. a. The conclusion that individual defendants cannot rely on the Vienna Convention to attack their convictions is fully consistent with the accepted understanding that the Vienna Convention is self-executing. See S. Exec. Rep. No. 9, *supra*, at 5. The Vienna Convention is self-executing in the sense that government officials can provide foreign nationals with access to consular officers without the need for implementing legislation and can give effect to provisions that were intended to be judicially enforced, such as those relating to consular privileges and immunities.[7] But it is an entirely separate question whether Article 36 gives a foreign national a private right to challenge his conviction and sentence on the ground that consular access was denied. Restatement (Third) of Foreign Relations Law § 111 cmt. h ("whether a treaty is self-executing is a question distinct from whether the treaty creates private rights or remedies."). As discussed above, the available evidence shows that Article 36 does not confer such a right.

The question whether a private individual has a judicially enforceable right is also distinct from the question whether the United States could seek judicial relief in the event that state officials failed to provide a foreign national access to consular officers as required by the Vienna Convention. Under longstanding principles, the government could sue to vindicate a treaty right in the event of its denial. See *Sanitary Dist.* v. *United States*, 266 U.S. 405, 425-426 (1925) (Holmes, J.) (United States has authority to sue "to carry out treaty obligations to a foreign power"; "The Attorney General by virtue of his office may bring [such a] proceeding and no statute is necessary to authorize the suit."). The inherent authority of the United States to bring an action stems from the constitutionally grounded primacy of the national government in the realm of foreign affairs and the need for the United States to be able to effectuate treaty obligations and speak with one voice in dealing with foreign nations. See Section IV (B) & (C), *infra*. No similar principle confers a general right to enforce treaties on private individuals.

b. Petitioner relies (Br. 26-29, 46-47) on this Court's decisions in *United States* v. *Rauscher*, 119 U.S. 407 (1886); *Wildenhus's Case*, 120 U.S. 1 (1887); and *Johnson* v. *Browne*, 205 U.S. 309 (1907), to support his claim that Article 36 confers judicially enforceable individual rights. None of these cases alters the basic principle that treaties do not ordinarily confer individual rights that a foreign national can vindicate in domestic courts, nor are they relevant to the instant question whether the Vienna Convention, by its language, purpose, and drafters' intent, can be categorized as a treaty creating judicially enforceable individual rights.

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[7] See, *e.g.*, *Risk* v. *Halvorsen*, 936 F.2d 393, 397 (9th Cir. 1991) (finding consular officer immune under Vienna Convention Article 43(1), 21 U.S.T. at 104, because duties were consular functions), cert. denied, 502 U.S. 1035 (1992); *Gerritsen* v. *de la Madrid Hurtado*, 819 F.2d 1511, 1515-1516 (9th Cir. 1987) (recognizing the enforceability of the consular immunity provision of the Convention, but finding that the criminal actions at issue did not qualify for immunity).

In *Rauscher*, 119 U.S. at 419-424, the Court held that a criminal defendant who is formally extradited to the United States pursuant to a treaty request may not be prosecuted for an offense other than the one that formed the basis for his extradition. As this Court has explained, the rule of specialty applied by the Court in *Rauscher* had been "implied * * * in the Webster-Ashburton Treaty [on extradition] because of the practice of nations with regard to extradition treaties," and that "any doubt" concerning a fugitive's ability to seek judicial enforcement of the treaty-conferred rule of specialty "was put to rest by two federal statutes which imposed the doctrine of specialty upon extradition treaties to which the United States was a party." *United States* v. *Alvarez-Machain*, 504 U.S. 655, 667 (1992).

In *Johnson* v. *Browne*, 120 U.S. at 320-321, the Court held that a successor treaty to the Webster-Ashburton Treaty at issue in *Rauscher* "prevent[ed] a State from obtaining jurisdiction of an individual whose extradition [wa]s sought on one ground and for one express purpose" (*i.e.*, future prosecution for an offense specified as an extraditable offense under the treaty), "and then us[ing] [its custody of the extradited person] for a different purpose' (*i.e.*, imprisoning the extradited person for a non-extraditable offense on which he had been previously convicted). In reaching that conclusion, the Court did not announce new legal principles; rather, it regarded the result as a natural application of *Rauscher*. *Ibid.* As discussed above, there is no comparable background practice among nations to allow breaches of consular notification requirements to support appeals from criminal convictions, and, unlike the extradition treaties at issue in *Rauscher* and *Johnson* v. *Browne*, Article 36's requirements have never been implemented through congressional legislation.

Petitioner's reliance on *Wildenhus's Case*, 120 U.S. 1 (1887), is similarly misplaced. At issue there was whether the Belgian consul or local authorities had jurisdiction under the terms of a treaty between the United States and Belgium to try a foreign crewman for the murder of another crewman aboard a Belgian vessel anchored in a United States port. As the Court recognized, the treaty provision at issue there "govern[ed] the conduct of the United States and Belgium toward each other in this particular," was "part of the supreme law of the United States," and generally precluded local authorities from prosecuting ship-board offenses, unless such offense was "of a nature to disturb the public peace." *Id.* at 17. In stating that the Belgian consul would have a right of access to the courts to bring a habeas corpus action to vindicate Belgium's exclusive jurisdiction under the treaty, *ibid.*, the Court made clear that the treaty only "settle[d] and define[d] the rights and duties of the contracting parties" (*id.* at 12), and not those of individual seamen aboard foreign vessels in United States ports. There is no suggestion in the Court's decision that the treaty allowed the foreign seaman detained for murder to invoke domestic legal processes to avoid prosecution by local authorities. Nor is the treaty at issue there, which specifically defined and allocated the jurisdiction of courts, analogous to the treaty at issue here, which is silent about the role of courts with respect to consular notification issues.

7. The principle that the Court should give "respectful consideration" to an international court's interpretation of a treaty, *Breard*, 523 U.S. at 375, does not lead to the conclusion that Article 36 affords an individual a right to challenge his conviction and sentence. In *LaGrand* and *Avena*, the ICJ concluded that "Article 36, paragraph 1, creates individual rights, which, by virtue of Article I of the Optional Protocol, may be invoked in this Court by the national State of the detained person." *LaGrand*, 2001 I.C.J. ¶ 77, at 493; Pet. App.

214a, para. 40. That passage does not state that Article 36 gives a foreign national a domestically enforceable private right. Instead, consistent with the position stated in this brief, it states only that, when there has been a denial of foreign national's Article 36 rights, a *State* may seek relief *from the ICJ.*

In *LaGrand*, the ICJ concluded that, because the United States failed to inform the LaGrand brothers of their rights as required by Article 36(1), its later application of a procedural default rule to refuse to consider their claim of prejudice arising from that breach violated Article 36(2)'s requirement that the laws of the receiving State "must enable full effect to be given to the purposes for which the rights accorded under this Article are intended." 2001 I.C.J. ¶ 91, at 497-498. That conclusion presupposes either that Article 36(1)'s reference to "rights," Article 36(2)'s "full effect" requirement, or the two together create an obligation for criminal courts (or perhaps some other entity) to attach "legal significance" to a violation of Article 36(1) in a criminal proceeding. See *ibid.*; *Avena*, Pet. App. 248a-249a, para. 113. While the ICJ's understanding of the Convention's requirements is entitled to respectful consideration, it is ultimately the responsibility of this Court to interpret the meaning of a federal treaty. Moreover, the level of "consideration" is at its nadir when the Executive Branch, whose views on treaty interpretation are entitled to at least "great weight," has considered the ICJ's decisions and determined that its own longstanding interpretation of the treaty is the correct one. Under those circumstances and in light of the considerations discussed above, the correct reading of Article 36 is that it does not give a criminal defendant a private right to challenge his conviction and sentence on the ground that Article 36 was breached.

B. The Vienna Convention Does Not Preclude Application Of Procedural Default Principles

Even if Article 36 did give a foreign national a private right to challenge his conviction and sentence on the ground that Article 36 was breached, that would not mean that the Convention required the Texas habeas court to review and reconsider petitioner's Vienna Convention claim. Petitioner procedurally defaulted his claim by failing to raise it at trial. Procedural default is an adequate and independent ground supporting the state habeas court's judgment, *Wainwright* v. *Sykes*, 433 U.S. 72 (1977), and the Vienna Convention does not preclude application of procedural default rules.

The Court definitely resolved that issue of treaty interpretation in *Breard.* In that case, the Court held that the procedural rules of the forum State, including rules on procedural default, govern implementation of the Vienna Convention. 523 U.S. at 375. The Court reasoned that, under a background international law principle, the procedural rules of the forum State govern implementation of a treaty absent "a clear and express statement to the contrary," and that, by providing that Article 36 rights "shall be exercised in conformity with the laws and regulations of the receiving State," Article 36(2) reinforced, rather than overcame, that default rule. *Ibid.*

As discussed above, the ICJ in *LaGrand* concluded that applying procedural default to bar consideration of a challenge to a defendant's conviction and sentence violates Article 36(2)'s requirement that laws of the forum state "must enable full effect to be given to the purposes for which the rights accorded under this Article are intended." But a general "full effect" clause cannot be understood to override application of rules that are as deeply embedded in the criminal justice system as rules of procedural default. At the very least, a general "full effect" clause falls short of supplying "a clear and express statement" (*Breard*, 523 U.S. at 375) that ordinary procedural default rules cannot be applied.

Application of the principle that a criminal defendant defaults a claim that he has not presented at trial no more prevents full effect from being given to the purposes of Article 36 than it prevents full effect from being given to the purposes of constitutional rights, such as the right against compelled self- incrimination. See *Ylst* v. *Nunnemaker*, 501 U.S. 797, 801 (1991) (procedural default applies to *Miranda* claims); *Wainwright* v. *Sykes*, 434 U.S. at 87-88 (procedural default applies to voluntariness claims). A procedural default rule always operates to cut off what otherwise might be a valid claim. Accordingly, the possibility that it might have that effect on a Vienna Convention claim is not a sufficient basis for concluding that full effect is not being given to the purposes of Article 36.

Nor is the possibility that a foreign national might not be aware of the rights specified in Article 36 a sufficient basis for reaching that conclusion. A reasonably diligent counsel should be in a position to assert any potential Vienna Convention claim at trial. The Vienna Convention has been in effect since 1969, it is published at 21 U.S.T. 77, 596 U.N.T.S. 262, and it has been mentioned in several reported decisions. *Murphy*, 116 F.3d at 100. "Treaties are one of the first sources that would be consulted by a reasonably diligent counsel representing a foreign national." *Ibid.* Other defendants had been relying on the Vienna Convention years before petitioner's prosecution. See *ibid.* (citing *Faulder* v. *Johnson*, 81 F.3d 515, 530 (5th Cir.), cert. denied, 519 U.S. 995 (1996), in which habeas counsel had located the Vienna Convention before the 1992 filing date of the habeas petition). Cf. *Bousley* v. *United States*, 523 U.S. 614, 622 (1998) (claim clearly is reasonably available to counsel when other defendants are raising it). Relying on counsel to identify a Vienna Convention claim is no different from relying on counsel to raise potential constitutional claims that are unknown to the defendant. Thus, while the ICJ's interpretation of Article 36(2) is entitled to respectful consideration, it does not provide a basis for the Court to overrule its controlling decision in *Breard*.

III. THE *AVENA* DECISION IS NOT PRIVATELY ENFORCEABLE

Petitioner principally contends (Br. 19-37) that Article 36 of the Vienna Convention, the Optional Protocol, Article 94 of the United Nations Charter, 59 Stat. 1031, and Article 59 of the ICJ statute, 59 Stat. 1055, make the ICJ's *Avena* decision a binding rule of decision in the state and federal courts of the United States. None of those sources, however, qualifies the *Avena* decision, standing alone, as privately enforceable federal law.

A. As discussed in Section II, *supra*, Article 36 does not give foreign nationals a right that can be enforced through an attack on a criminal judgment. More important for present purposes, however, Article 36 does not mention the possible effect of an ICJ decision. Article 36 therefore cannot be a source for private enforcement of an ICJ decision.

By subscribing to the Optional Protocol, the United States agreed that, as long as it remains a party to the Protocol, "[d]isputes arising out of the interpretation or application of the [Vienna Convention] shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol." 21 U.S.T. at 326, 596 U.N.T.S. at 488. The Optional Protocol, however, operates only as a grant of "jurisdiction" to the ICJ over suits brought by other Nations that are parties to the Optional Protocol. It does not commit the United States to comply with a resulting ICJ decision, much less make such a decision privately enforceable in a criminal proceeding by an individual.

B. The source of the United States' obligation to comply with ICJ decisions is not the Optional Protocol, but Article 94 of the U.N. Charter, which is itself a treaty. It provides that "[e]ach member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party." Article 94 imposes an international duty on the United States to comply with ICJ decisions in a case in which the U.N. Member is a party by its consent to ICJ jurisdiction. But as the text and background of Article 94 demonstrate, it does not make an ICJ decision privately enforceable in court. And that is particularly true in light of the background presumption that treaties do not give rise to private, judicially enforceable rights.

1. Article 94 states that a U.N. member "undertakes to comply" with an ICJ decision. The phrase "undertakes to comply" does not constitute an acknowledgment that an ICJ decision will have immediate legal effect in the courts of U.N. members. Instead, it constitutes a *commitment* on the part of U.N. members to take *future* action through their political branches to comply with an ICJ decision.

Furthermore, because Article 94(1) does not detail the means of compliance with an ICJ decision, it necessarily contemplates that the political branches of member Nations would have discretion to choose how to comply. If an ICJ decision were subject to immediate private enforcement in the courts of member Nations, it would rob the political branches of that discretion. Likewise, even if a Nation decides to comply with the decision in a particular case, it retains the option of protecting itself from further decisions based on the legal principles of that case by withdrawing from the Optional Protocol. Giving automatic effect to the reasoning of an ICJ decision—for example, by recognizing an individual right on the strength of the *Avena* decision—robs

the political branches of the discretion to limit the effect of a decision to those covered by the decision by withdrawing from the Optional Protocol.

2. Article 94(2) of the U.N. Charter confirms that ICJ decisions are not privately enforceable in the courts of member Nations. It provides that "[i]f any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment." 59 Stat. 1051. Article 94(2) envisions that the political branches of a Nation may choose not to comply with an ICJ decision, and provides that, in that event, recourse to the Security Council is the sole remedy. Private judicial enforcement in domestic courts is incompatible with that enforcement structure. If ICJ decisions became immediately enforceable in domestic courts, Article 94(2) would be superfluous.

3. There is no relevant evidence in the ratification history that ICJ decisions would be judicially enforceable. Instead, the understanding was that ICJ decisions would be subject to enforcement by the Security Council. The Executive Branch expressed that view during consideration of the U.N. Charter.[8] It expressed that view one year later when

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[8] Report to the President on the Results of the San Francisco Conference by the Chairman of the United States Delegation, the Secretary of State (June 26, 1945) (statement of Secretary of State Edward R. Stettinius, Jr.) ("The first paragraph of Article 94 is a simple statement of the obligation of each Member of the United Nations to comply with the decision in any case to which it is a party. The second paragraph of this Article links this part of the Charter's system of pacific settlement of disputes with other parts by providing that if a state fails to perform its obligations under a judgment of the Court, the other party may have recourse to the Security Council which may, if it deems it necessary, take appropriate steps to give effect to the judgment."). The Charter of the United Nations

the Senate considered the declaration accepting compulsory jurisdiction of the ICJ.[9] And Senators expressed that view during debate on accepting compulsory ICJ jurisdiction.[10]

4. The D.C. Circuit is the only court of appeals that has addressed the issue, and it has held that ICJ decisions are not privately enforceable. See *Committee of United States Citizens Living in Nicaragua* v. *Reagan*, 859 F.2d 929, 938 (D.C. Cir. 1988). That court reasoned that "[t]he words of Article 94 'do not by their terms confer rights upon individ-

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for the Maintenance of International Peace and Security: Hearings Before the Senate Comm. on Foreign Relations (Senate Hearings) (1945), 79th Cong., 1st Sess. 124-125; *7/10/45 Senate Hearings* 286 (statement of Leo Paslovsky, Special Assistant to the Secretary of State for International Organizations and Security Affairs) ("[W]hen the Court has rendered a judgment and one of the parties refuses to accept it, then the dispute becomes political rather than legal. It is as a political dispute that the matter is referred to the Security Council."); *id.* at 330-331 (statement of Green H. Hackworth, State Department Legal Adviser (Article 94(2) provides the means of enforcing ICJ decisions).

[9] *A Resolution Proposing Acceptance of Compulsory Jurisdiction of International Court of Justice: Hearings on S. Res. 196 Before the Subcomm. of the Senate Comm. on Foreign Relations, 79th* Cong., 2d Sess. 142 (1946) (statement of Charles Fahy, State Department Legal Adviser) (parties have "a moral obligation" to comply with ICJ decisions, and Article 94(2) constitutes the exclusive means of enforcing such decisions).

[10] 92 Cong. Rec. 10,694 (1946) (statement of Senator Pepper) ("The power of effective enforcement lies only in the Security Council; and in the Security Council an effective decision cannot be made to take action against a nation unless there is unanimity of the Big Five. Therefore, so far as the United States is concerned, a power which of necessity will always be a party to the Security Council under the provisions which require the Big Five to be permanent members of the Security Council, the United States will always have the power, through the exercise of the veto, to prevent effective enforcement of a judgment of the Court against the United States.); *id.* at 10,695 (statement of Senator Connally) ("[W]hen the Court undert[akes] to enforce its judgment by certifying the question to the Security Council, we could tell the Court and the Security Council to take a walk.").

ual citizens; they call upon governments to take certain action.'" *Ibid.* (citation omitted). The D.C. Circuit's analysis is sound. Article 94 creates an international obligation on U.N. members to comply with an ICJ decision; it does not empower a private individual to enforce it.[11]

C. Article 59 of the ICJ statute, 59 Stat. 1055, incorporated into the U.N. Charter, provides that "[t]he decision of the [ICJ] has no binding force except between the parties and in respect of that particular case." That statute reinforces what the U.N. Charter establishes—that the ICJ decision is "binding" in the sense that parties have an international obligation to comply with the decision. It does not provide that the ICJ's "binding" decision is judicially enforceable. Indeed, the ICJ statute affirmatively negates the possibility of private judicial enforcement because it makes an ICJ decision binding only "between the parties," and a private individual cannot be a party to an ICJ dispute. Thus, the Vienna Convention, the Optional Protocol, the U.N. Charter, and the ICJ Statute do not either alone or in combination make an ICJ decision judicially enforceable.

D. Nor did the ICJ purport to make its *Avena* decision immediately enforceable in United States courts. The ICJ determined that the United States' obligation was "to provide, *by means of its own choosing*, review and reconsideration of the convictions and sentences of the [affected] Mexican nationals." Pet. App. 273a, para. (9) (emphasis added).

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[11] Courts addressing other provisions of the U.N. Charter have also held that they are not judicially enforceable. See *Flores* v. *Southern Peru Copper Corp.*, 343 F.3d 140, 156 n.24 (2d Cir. 2003) (U.N. Charter is not self-executing); *Frolova* v. *USSR*, 761 F.2d 370, 374 (7th Cir. 1985) (Articles 55 and 56 of the U.N. Charter are not self-executing); *Spiess* v. *C. Itoh & Co. (Am.), Inc.*, 643 F.2d 353, 363 (5th Cir. 1981) (U.N. Charter is not self- executing), vacated on other grounds, 457 U.S. 1128 (1982); *Hitai* v. *INS*, 343 F.2d 466 (2d Cir. 1965) (Article 55 of the U.N. Charter is not self-executing).

By seeking immediate judicial enforcement, petitioner would deprive the political branches of the very choice of means that the ICJ intended for them to have.

E. In arguing that the ICJ decision is judicially enforceable, petitioner places great weight (Br. 30-31, 36) on the accepted understanding that the Vienna Convention is self-executing. That reliance is misplaced for two reasons. First, petitioner mistakenly equates a self-executing treaty with a privately enforceable one. As previously discussed, while Article 36 is self-executing in the sense that state authorities are required to observe the terms of the Convention without implementing legislation, it does not confer any judicially enforceable private rights. See Section II, *supra*.

More fundamentally, even if Article 36 were privately enforceable, that would not make an ICJ decision privately enforceable. The United States' obligation to comply with an ICJ decision does not flow from the Vienna Convention, but from Article 94 of the U.N. Charter. And as discussed above, under Article 94, an ICJ decision is not privately enforceable.

IV. THE PRESIDENT HAS DETERMINED THAT, WITH RESPECT TO 51 INDIVIDUALS, THE *AVENA* DECISION SHOULD BE ENFORCED IN STATE COURTS IN ACCORDANCE WITH PRINCIPLES OF COMITY

A. Even though an ICJ decision is not privately enforceable, the United States has an international obligation under Article 94 to comply with the *Avena* decision.[12] In *Avena*,

the ICJ found that the United States had violated the Vienna Convention by not informing 51 Mexican nationals, including petitioner, of their rights under Article 36(1)(b), and by not notifying consular authorities of the detention of 49 Mexican nationals, including petitioner. Pet. App. 271a, paras. (4) and (5). The ICJ made additional findings with respect to violations of Mexico's rights under Article 36(1)(a) and (c). *Id.* at 271a-272a, paras. (6) and (7).

The ICJ found that the appropriate remedy "consists in the obligation of the United States of America to provide, by means of its own choosing, review and reconsideration of the convictions and sentences of the [affected] Mexican nationals, * * * by taking [into] account paragraphs 138 to 141 of this Judgment." Pet. App. 273a, para. (9). In paragraph 138, the ICJ stated that review and reconsideration should "guarantee that the violation and the possible prejudice caused by that violation will be fully examined and taken into account." *Id.* at 261a. In paragraph 143, the ICJ found "that the clemency process, as currently practiced within the United States criminal justice system, does not appear to meet the requirements described in paragraph 138 above and that it is therefore not sufficient in itself to serve as an appropriate means of 'review and reconsideration' as envisaged by the Court." *Id.* at 263a. In paragraph 140, the ICJ stated that it "considers that it is the judicial process that is suited to this task." *Id.* at 262a. The ICJ elsewhere stated that the United States should "permit review and reconsideration of these nationals' cases by the United States courts, * * * with a view to ascertaining whether in each case the violation of Article 36 committed by the competent authorities caused actual prejudice to the defendant in the process of administration of criminal justice." *Id.* at 253a, para. (121).

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[12] In the language of the U.N. Charter, the United States has an international law obligation to comply with the "decision" of the ICJ. U.N. Charter 94(1). The decision does not have force as precedent. See ICJ Statute Art. 59 ("The decision of the [ICJ] has no binding force except between the parties and in respect of that particular case."). This brief uses the term "decision" to refer to the portion of the ICJ ruling with which the United States has an international obligation to comply—what in United States practice would be called the judgment. The United States does not have an international obligation to acquiesce in or follow the legal reasoning of the opinion.

The ICJ decision is ambiguous on some key points. But the Executive Branch interprets the decision to place the United States under an international obligation to choose a means for 51 individuals to receive review and reconsideration of their convictions and sentences to determine whether the denial of the Article 36 rights identified by the ICJ caused actual prejudice to the defense either at trial or at sentencing.

B. The President is "the sole organ of the federal government in the field of international relations." *United States* v. *Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936). The President, through subordinate Executive Branch officials, represents the United States in cases before the ICJ, and the President's representative serves as delegate to the United Nations and acts on his behalf in the Security Council if controversies should arise over compliance with an ICJ decision. See 22 U.S.C. 287 (authorizing the President to appoint persons to represent the United States in the United Nations); 22 U.S.C. 287a (persons appointed under Section 287 shall, "at all times, act in accordance with the instructions of the President"). In addition, the President enjoys "a degree of independent authority to act" in "foreign affairs." *American Ins. Assoc.* v. *Garamendi*, 539 U.S. 396, 414 (2003). Against those background understandings, Article 94 implicitly grants the President "the lead role" in determining how to respond to an ICJ decision. Cf. *id.* at 415 (internal quotation marks omitted); see also *First Nat'l City Bank* v. *Banco Nacional de Cuba*, 460 U.S. 759, 767 (1972) (plurality opinion).

In particular circumstances, the President may decide that the United States will not comply with an ICJ decision and direct a United States veto of any proposed Security Council enforcement measure.[13] Here, however, the President has determined that the foreign policy interests of the United States justify compliance with the ICJ's decision. Consular assistance is a vital safeguard for Americans abroad, and the government has determined that, unless the United States fulfills its international obligation to achieve compliance with the ICJ *Avena* decision, its ability to secure such assistance could be adversely affected.

Once the President makes a decision to comply with an ICJ decision, the President must then consider the most appropriate means of compliance. In some cases, compliance may be achieved through unilateral Executive Branch action. In other cases, the Executive Branch may seek implementing legislation as a means of compliance. In this instance, in light of the paramount interest of the United States in prompt compliance with the ICJ's decision with respect to the 51 named individuals, and the suitability of judicial review as a means of compliance, the President has made the following determination:

> I have determined, pursuant to the authority vested in me as President by the Constitution and laws of the United States, that the United States will discharge its international obligations under the decision of the Inter-

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[13] That was the case with respect to the ICJ's ruling in *Nicaragua* v. *United States*, 1986 I.C.J. Rep. 14, 146, 25 I.L.M. 1337 (1986) in which the ICJ ruled that the United States was obligated to cease certain activities in Nicaragua and to make reparation to that country for injuries purportedly caused by breaches of customary international law. The United States, which had withdrawn its submission to the ICJ's jurisdiction and withdrawn from proceedings before the ICJ, refused to recognize the validity of the ICJ's decision, did not pay reparation to Nicaragua, and subsequently vetoed a U.N. Security Council resolution calling for it to comply with the ICJ's judgment. United Nations Security Council: Excerpts from Verbatim Records Discussing I.C.J. Judgment in *Nicaragua* v. *United States*, 25 I.L.M. 1337, 1352, 1363 (1986).

> national Court of Justice in the *Case Concerning Avena and Other Mexican Nationals (Mexico* v. *United States of American* (*Avena*), 2004 I.C.J. 128 (Mar. 31), by having state courts give effect to the decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision.

Memorandum for the Attorney General, App. *infra*.

Under that determination, in order to obtain "review and reconsideration" of their convictions and sentences in light of the decision of the ICJ in *Avena*, the 51 named individuals may file a petition in state court seeking such review and reconsideration, and the state courts are to recognize the *Avena* decision. In other words, when such an individual applies for relief to a state court with jurisdiction over his case, the *Avena* decision should be given effect by the state court in accordance with the President's determination that the decision should be enforced under general principles of comity.

Because compliance with the ICJ's decision can be achieved through judicial process, and because there is a pressing need for expeditious compliance with that decision, the President determined to exercise his constitutional foreign affairs authority and his authority under Article 94 of the U.N. Charter to establish that binding federal rule without the need for implementing legislation. Cf. *Dames & Moore* v. *Regan*, 453 U.S. 654 (1981); *Sanitary Dist.* v. *United States*, 266 U.S. 405 (1925). The authority of the President to determine the means by which the United States will implement its international legal obligations is especially important in the context of a treaty, like the Vienna Convention, that not only protects foreign nationals in this country, but also protects Americans overseas. Under the Constitution, it is the President alone who—through diplomatic and other means—can protect Americans deprived of liberty abroad. Congress has recognized that the President alone can perform the diplomatic protective function of Americans abroad. See 22 U.S.C. 1732.[14] In deciding what actions the United States will take to implement its Vienna Convention obligations and to address the ICJ decision in *Avena*, the President must make delicate and complex calculations—for which he is uniquely suited—taking into account the need for the United States to be able to enforce its laws effectively against foreign nationals in the United States, the need for the United States to be able to protect Americans abroad, judgments about the likely responses of various foreign countries to potential United States actions with respect to the Vienna Convention, and other United States foreign policy interests.

To the extent that state procedural default rules would prevent giving effect to the President's determination that the *Avena* decision should be enforced in accordance with principles of comity, those rules must give way, because Executive action that is undertaken pursuant to the President's authority under Article II of the Constitution and authorized by his power to represent the United States in the United Nations, see U.N. Charter Art. 94, constitutes "the supreme

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[14] Section 1732 provides:

> Whenever it is made known to the President that any citizen of the United States has been unjustly deprived of his liberty by or under the authority of any foreign government, it shall be the duty of the President forthwith to demand of that government the reasons of such imprisonment; and if it appears to be wrongful and in violation of the rights of American citizenship, the President shall forthwith demand the release of such citizen, and if the release so demanded is unreasonably delayed or refused, the President shall use such means, not amounting to acts of war and not otherwise prohibited by law, as he may think necessary and proper to obtain or effectuate the release; and all the facts and proceedings relative thereto shall as soon as practicable be communicated by the President to Congress.

Law of the Land." U.S. Const. Art. VI, Cl. 2. State courts are not required to reach any particular outcome, but are instead to evaluate in each case whether the violation of Article 36 "caused actual prejudice to the defendant in the process of administration of criminal justice," Pet. App. 253a, bearing in mind that "speculative * * * claims of prejudice" (*Breard*, 523 U.S. at 377) do not warrant relief. The state court judgments addressing those individuals' claims would raise federal issues that are ultimately reviewable in this Court.[15]

C. The President's authority to issue his determination rests not only on his authority to determine how the United States will respond to an ICJ decision, see U.N. Charter Art. 94, but also on the President's authority under Article II of the Constitution to manage foreign affairs. "Although the source of the President's power to act in foreign affairs does not enjoy any textual detail, the historic gloss on the 'executive Power' vested in Article II of the Constitution has recognized the President's 'vast share of responsibility for the conduct of our foreign relations.'" *American Ins. Assoc.* v. *Garamendi*, 539 U.S. at 414 (quoting *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 610-611 (1952) (Frankfurter, J., concurring)). In the field of foreign relations, "the President has a degree of independent authority to act." *Garamendi*, 539 U.S. at 414. The President's Article II power over foreign affairs "does not require as a basis for its exercise an act of Congress." *United States* v. *Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936); see *Sanitary Dist.*, 266 U.S. at 425-426 (authority of the Attorney General to bring an action in court to secure compliance with a treaty does not require legislation).[16]

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[15] Any claims brought on federal habeas corpus, if the state courts denied relief, would have to satisfy the requirements of the AEDPA. Cf. *Breard*, 523 U.S. at 376.

Consistent with that understanding, the Court has repeatedly held that the President has authority to make executive agreements with other countries to settle claims without ratification by the Senate or approval by Congress. *Garamendi*, 539 U.S. at 415; *Dames & Moore* v. *Regan*, 453 U.S. at 679, 682-683; *United States* v. *Pink*, 315 U.S. 203, 223 (1942); *United States* v. *Belmont*, 301 U.S. 324, 330-331 (1937). The Court has also held that such agreements preempt conflicting state law. *Garamendi*, 539 U.S. at 416-417; *Pink*, 315 U.S. at 223, 230-231; *Belmont*, 301 U.S. at 327, 331.

If, as those cases hold, the President may enter into an executive agreement to resolve a dispute with a foreign government, the President should be equally free to resolve a dispute with a foreign government by determining how the United States will comply with a decision reached after the completion of formal dispute-resolution procedures with that foreign government. To require the President to enter into yet another formal bilateral agreement in order to exercise his power "would hamstring the President in settling international controversies" and weaken this Nation's ability to fulfill its treaty obligations. *Garamendi*, 539 U.S. at 416.

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[16] Recognition of a similar independent Executive authority is reflected in the Court's holdings that the judiciary had a "duty" to give effect to the Executive's suggestion of a foreign sovereign's immunity. See, *e.g.*, *Compania Espanola de Navegacion Maritima* v. *The Navemar*, 303 U.S. 68, 74 (1938) ("If the claim is recognized and allowed by the executive branch of the government, it is then the duty of the courts to release the vessel upon appropriate suggestion by the Attorney General of the United States, or other officer acting under his direction."); *Ex parte Republic of Peru*, 318 U.S. 578, 587-589 (1943); *Republic of Mexico* v. *Hoffman*, 324 U.S. 30, 35 (1945) ("It is therefore not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize.").

Such a limitation would fail to recognize the practical reality that there are occasions when a foreign government may acquiesce in a resolution that it is unwilling to formally approve. It would also fail to recognize that obtaining a formal agreement can be a time-consuming process that is ill-suited for occasions when swift action is required. And it would have the perverse effect of assigning to a foreign government veto power over the President's exercise of his authority over foreign affairs.

D. As explained above, the President's determination is that the *Avena* decision is to be enforced in accordance with principles of comity. Accordingly, a state court would not be free to reexamine whether the ICJ correctly determined the facts or correctly interpreted the Vienna Convention. Under principles of comity, "the merits of the case should not * * * be tried afresh, as on a new trial or an appeal, upon the mere assertion * * * that the judgment was erroneous in law or in fact." *Hilton* v. *Guyot*, 159 U.S. 113, 203 (1895). When principles of comity apply, a foreign judgment is given effect without reexamination of the merits of the decision, provided that the court rendering the judgment had jurisdiction, the court was impartial, its procedures satisfied due process, and there is no "special reason why the comity of this nation should not allow it full effect." *Id.* at 202. The President's determination that the ICJ decision is entitled to comity is consistent with those principles.

Further, as noted above, under the ICJ statute, ICJ decisions are binding only "between the parties" and "in respect of that particular case." 59 Stat. 1062. The ICJ's decision in *Avena* found violations of the Vienna Convention with respect to 51 specific individuals. The President's determination that judicial review and reconsideration should be afforded in this nation's courts applies to the 51 individuals whose rights were determined in the *Avena* case. The scope of the President's determination is thus consistent with the scope of the ICJ's specific determinations in the individual cases before it.

The President's determination that domestic courts should provide review and reconsideration under the ICJ's decision, without prejudice to the courts' power to consider afresh in other cases the underlying treaty-interpretation and application issues subsumed in the ICJ's rulings, accords with general standards for determining when judgments against the United States are binding in subsequent litigation. When a party has obtained a final judgment against the United States, that judgment is binding in subsequent litigation between the United States and that party. The United States is not free to relitigate the merits of the particular dispute. See *United States* v. *Stauffer Chem. Co.*, 464 U.S. 165 (1984); *Montana* v. *United States*, 440 U.S. 147 (1979). In contrast, a judgment against the United States obtained by one party does not preclude the United States from relitigating the underlying merits of particular legal theories in actions brought by or against other parties. See *United States* v. *Mendoza*, 464 U.S. 154 (1984). Analogous principles here justify the President's decision to give effect to the final decision of the ICJ with respect to the 51 named individuals whose rights under the Vienna Convention were found to be violated, while leaving the government and the courts free to address the underlying merits in other cases.

E. Once the conditions for application of the Executive Branch determination are satisfied, a state court is required to review and reconsider the conviction and sentence of the affected individual to determine whether the violations identified by the ICJ caused actual prejudice to the defense at trial or at sentencing, bearing in mind that speculative showings of prejudice are insufficient. *Breard*, 523 U.S. at 377. If prejudice were found, a new trial or a new sentencing would be ordered. A state court may not, however, interpose procedural default to prevent review and reconsideration.

Nothing in the Court's *Breard* decision is inconsistent with that conclusion. As already discussed, *Breard* holds that the Vienna Convention does not prevent application of procedural default rules to a Vienna Convention claim. 523 U.S. at 375. The President's determination, which means that procedural default rules may not prevent review and reconsideration for the 51 individuals identified in *Avena*, is emphatically *not* premised on a different interpretation of the Vienna Convention. To the contrary, as explained in Section II, the Executive Branch regards the Court's holding in *Breard* as controlling on that issue. Nonetheless, pursuant to his authority under the U.N. Charter and Article II of the Constitution, the President has determined that the foreign policy interests of the United States in meeting its international obligations and protecting Americans abroad require the ICJ's decision to be enforced without regard to the merits of the ICJ's interpretation of the Vienna Convention. Just as *Breard* would not stand in the way of legislation that provided for the implementation of the *Avena* decision, it does not stand in the way of the President's determination that the *Avena* decision should be given effect.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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FEBRUARY 2005

APPENDIX 1

1. The Supremacy Clause to the Constitution, U.S. Const. Art. 6, Cl. 2, provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

* * * * *

2. The Vienna Convention on Consular Relations, Dec. 14, 1969, 21 U.S.T. 77, provides in its Preamble and Article 36:

> The States Parties to the present Convention,
>
> Recalling that consular relations have been established between peoples since ancient times,
>
> Having in mind the Purposes and Principles of the Charter of the United Nations concerning the sovereign equality of States, the maintenance of international peace and security, and the promotion of friendly relations among nations,
>
> Considering that the United Nations Conference on Diplomatic Intercourse and Immunities adopted the Vienna Convention on Diplomatic Relations which was opened for signature on 18 April 1961,
>
> Believing that an international convention on consular relations, privileges and immunities would also contribute to the development of friendly relations

among nations, irrespective of their differing constitutional and social systems,

Realizing that the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of functions by consular posts on behalf of their respective States,

Affirming that the rules of customary international law continue to govern matters not expressly regulated by the provisions of the present Convention,

Have agreed as follows:

* * * * *

Article 36

Communication and contact with nationals of the sending State

1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:

(a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;

(b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph;

(c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.

2. The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended.

3. The Optional Protocol Concerning the Compulsory Settlement of Disputes, 21 U.S.T. 325, provides in pertinent part:

> The States Parties to the present Protocol and to the Vienna Convention on Consular Relations, hereinafter referred to as "the Convention", adopted by the United Nations Conference held at Vienna from 4 March to 22 April 1963,

Expressing their wish to resort in all matters concerning them in respect of any dispute arising out of the interpretation or application of the Convention to the compulsory jurisdiction of the International Court of Justice, unless some other form of settlement has been agreed upon by the parties within a reasonable period,

Have agreed as follows:

Article I

> Disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol.

* * * * *

5. Article 94 of the United Nations Charter, 59 Stat. 1051, provides:

> 1. Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party.
>
> 2. If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.

5. Article 59 of the statute of the International Court of Justice, 59 Stat. 1062, provides:

> The decision of the Court has no binding force except between the parties and in respect of that particular case.

6. 28 U.S.C. 2253 provides in pertinent part:

> (c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—
>
> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
>
> (B) the final order in a proceeding under section 2255.
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.
>
> (3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

7. 28 U.S.C. 2254 provides in pertinent part:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

* * * * *

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States * * *.

* * * * *

APPENDIX 2

THE WHITE HOUSE
WASHINGTON

February 28, 2005

MEMORANDUM FOR THE ATTORNEY GENERAL

SUBJECT: Compliance with the Decision of the International Court of Justice in *Avena*

The United States is a party to the Vienna Convention on Consular Relations (the "Convention") and the Convention's Optional Protocol Concerning the Compulsory Settlement of Disputes (Optional Protocol), which gives the International Court of Justice (ICJ) jurisdiction to decide disputes concerning the "interpretation and application" of the Convention.

I have determined, pursuant to the authority vested in me as President by the Constitution and the laws of the United States of America, that the United States will discharge its international obligations under the decision of the International Court of Justice in the *Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America) (Avena)*, 2004 ICJ 128 (Mar. 31), by having State courts give effect to the decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision.

(24)

Supreme Court, U.S.
FILED
FEB 28 2005
OFFICE OF THE CLERK

No. 04-5928

IN THE
Supreme Court of the United States

◆

JOSÉ ERNESTO MEDELLÍN,
Petitioner,

v.

DOUG DRETKE, DIRECTOR, ETC.,
Respondent.

◆

On Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

◆

BRIEF FOR THE STATES OF ALABAMA, ARIZONA, CALIFORNIA, COLORADO, DELAWARE, FLORIDA, GEORGIA, IDAHO, INDIANA, KANSAS, MISSISSIPPI, MISSOURI, MONTANA, OHIO, OKLAHOMA, PENNSYLVANIA, SOUTH CAROLINA, TENNESSEE, UTAH, AND VIRGINIA, AS *AMICI CURIAE*, IN SUPPORT OF RESPONDENT

◆

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QUESTIONS PRESENTED

CAPITAL CASE

1. In a case brought by a Mexican national whose rights were adjudicated in the *Avena* Judgment, must a court in the United States apply as the rule of decision, notwithstanding any inconsistent United States precedent, the *Avena* holding that the United States courts must review and reconsider the national's conviction and sentence, without resort to procedural default doctrines?

2. In a case brought by a foreign national of a State party to the Vienna Convention, should a court in the United States give effect to the *LaGrand* and *Avena* Judgments as a matter of international judicial comity and in the interest of uniform treaty interpretation?

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INTEREST OF *AMICI CURIAE*

The States of Alabama, Arizona, California, Colorado, Delaware, Florida, Georgia, Idaho, Indiana, Kansas, Mississippi, Missouri, Montana, Ohio, Oklahoma, Pennsylvania, South Carolina, Tennessee, Utah, and Virginia ("the *Amici* States") respectfully submit this brief as *amici curiae* in support of Respondent in accordance with Sup. Ct. R. 39.1. Like the State of Texas, the *Amici* States all have foreign nationals (and alleged foreign nationals) incarcerated in their state prison systems. Of course, under the Supremacy Clause, U.S. Const. art. VI, cl. 2, the *Amici* States are, like Texas, subject to the requirements of Article 36 of the Vienna Convention on Consular Relations, *done* Apr. 24, 1963, 21 U.S.T. 77, 100–01, 596 U.N.T.S. 261, 292–94 ("Vienna Convention," "Convention," or "VCCR"), when their law enforcement officials arrest foreign nationals.

According to a recent study, over 56,000 noncitizens were in state prisons in 2003. Paige M. Harrison & Jennifer C. Karbert, Bur. of Justice Statistics, U.S. Dep't of Justice, *Prison and Jail Inmates at Midyear 2003*, Bur. of Justice Statistics Bull. 5 (May 2004, rev. July 14, 2004), http://www.ojp.usdoj.gov/bjs/pub/pdf/pjim03.pdf. According to one estimate, at least 120 foreign nationals have been convicted and are sentenced to death in the United States; of this number, 43 are in California, 27 in Texas, 22 in Florida, 5 in Arizona, 4 each in Nevada and Ohio, 3 in Louisiana, 2 in Pennsylvania, and 1 each in Alabama, Georgia, Mississippi, Montana, Nebraska, Oklahoma, Oregon, and Virginia. *See* Mark Warren, *Foreign Nationals and the Death Penalty in the United States*, http://www.deathpenaltyinfo.org/article.php?did=198&sci

d=31 (information as of Nov. 28, 2004) (last visited Feb. 25, 2005).[1]

In addition, thousands of residents of the *Amici* States live and travel abroad, where they may rely on the protections of the Vienna Convention when dealing with foreign governments. Accordingly, the *Amici* States have an interest in the proper interpretation and enforcement of Article 36 in this case and in the light of the judgments of the International Court of Justice (ICJ) in *Avena and Other Mexican Nationals* (Mex. v. U.S.), 2004 I.C.J. 1 (Mar. 31), and in the *LaGrand Case* (F.R.G. v. U.S.), 2001 I.C.J. 466 (June 27).

SUMMARY OF ARGUMENT

The Constitution places treaties and federal statutes on the same footing. Where there is a conflict between a treaty and a federal statute, the later in time controls. The relief Petitioner seeks in this action, full "review and reconsideration" of his conviction and sentence under Article 36(2) of the Vienna Convention as interpreted in *Avena*, conflicts with important provisions of the subsequently enacted Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). In this case, Petitioner is not entitled to a certificate of appealability under 28 U.S.C. § 2253(c)(2) because his Vienna Convention claim involves only an alleged violation of a treaty right, not a constitutional right.

In other cases, if not this one, however, mandatory "review and reconsideration" under Article 36(2) would conflict with additional provisions of AEDPA. As this Court observed in 1998, habeas petitioners generally are not entitled to an evidentiary hearing under 28 U.S.C. § 2254(e)(2) if they failed to develop the factual basis of a claim in state court. In some cases, AEDPA's one-year statute of limitations, 28 U.S.C. § 2244(d)(1), bars "review and reconsideration." In still other cases, a habeas petition seeking "review and reconsideration" would be barred as a "second or successive" petition under 28 U.S.C. § 2244(b).

Furthermore, although the Vienna Convention may be self-executing in the sense that implementing legislation is not required (at least in most instances), judgments of the International Court of Justice—even those construing the Vienna Convention—are not self-executing. This understanding of ICJ judgments is consistent with the ICJ Statute, the United Nations Charter, and the decisions in *LaGrand* and *Avena* themselves. Treating judgments of the ICJ as non-self-executing also avoids serious constitutional questions that would arise from a contrary interpretation.

Because the relief Petitioner seeks conflicts with AEDPA and because judgments of the ICJ are not self-executing, the Court should defer to the political branches to decide how the United States should comply with the judgment in *Avena*. Even if this Court were to modify the procedural default rule as Petitioner requests, that would not provide him with the relief he seeks, because such relief is independently barred by AEDPA. Given the statutory barriers to relief, it would be best to allow the Executive Branch and the Congress to address implementation of the judgment in *Avena* in the first instance, where all of the issues raised by that judgment can be considered together.

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[1] According to this list, two alleged foreign nationals in the federal prison system have also been convicted and sentenced to death. The list notes incomplete data from seven States and suggests that "[a] comprehensive list would likely include some 150 names . . . ." Warren, *supra*.

ARGUMENT

I. ARTICLE 36 OF THE VIENNA CONVENTION IS SUBJECT TO THE SUBSEQUENTLY ENACTED PROVISIONS OF THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996.

The relief sought by Petitioner in this case—"review and reconsideration of his conviction and death sentence without regard to the procedural default rules imposed by Texas law," Pet.'s Br. at 2, under Article 36(2) of the Vienna Convention—conflicts with important provisions of the subsequently enacted Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. 104-132, 110 Stat. 1214. In *Whitney* v. *Robertson*, 124 U.S. 190 (1881), this Court observed that the Constitution places "a treaty . . . on the same footing . . . with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other." *Id.* at 194. The Court went on to hold that, if a treaty and a federal statute "are inconsistent, *the one last in date will control the other* . . . ." *Id.* (emphasis added). Thus, "an Act of Congress . . . is on a full parity with a treaty, and . . . when a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null." *Reid* v. *Covert*, 354 U.S. 1, 18 (1957) (plurality opinion).

The first conflict between AEDPA and the relief Petitioner seeks is that AEDPA, by its plain terms, does not authorize the issuance of a certificate of appealability for alleged violations of treaty rights. Under AEDPA, "[a] certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a *constitutional* right." 28 U.S.C. § 2253(c)(2) (2000) (emphasis added). Importantly, Congress substituted the term "constitutional" for the term "federal" in § 2253(c)(2). This Court took "due note [of] the substitution" in *Slack* v.

McDaniel, 529 U.S. 473, 483 (2000), holding that "[t]o obtain a COA under § 2253(c), a habeas prisoner must make a substantial showing of the denial of a *constitutional* right . . . ." *Id.* at 483–84 (emphasis added). As the Fourth Circuit has held, Petitioner's "argument that his rights under the Vienna Convention were violated does not satisfy section 2253(c)(2)'s requirement because even if the Vienna Convention on Consular Relations could be said to create individual rights (as opposed to setting out the rights and obligations of signatory nations), it certainly does not create *constitutional* rights." *Murphy* v. *Netherland*, 116 F.3d 97, 99–100 (4th Cir.), *cert. denied*, 521 U.S. 1144 (1997).[2] Thus, Petitioner is not entitled to a certificate of appealability under § 2253(c)(2), a necessary prerequisite to a reversal of the district court's judgment denying his habeas petition and remand to that court for further proceedings.

The relief Petitioner seeks would also conflict with additional provisions of AEDPA in other cases, if not this one. The Court discussed one of these conflicts in *Breard* v. *Greene*, 523 U.S. 371 (1998) (*per curiam*). *See* 28 U.S.C. § 2254(e)(2) (2000). Namely, AEDPA "provides that a habeas petitioner alleging that he is held in violation of 'treaties of the United States' will, as a general rule, not be afforded an evidentiary hearing if he 'has failed to develop the factual basis of [the] claim in State court proceedings.'" *Id.* at 376 (quoting 28 U.S.C. § 2254(a) & (e)(2)). As in *Breard*, other habeas petitioners' "ability to obtain relief based on violations of the Vienna Convention is subject to this subsequently enacted rule, just as any claim arising under the United States Constitution would be." *Id.* Most significantly, § 2254(e)(2)

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[2] As the United States noted in *Slack*, "[s]ome courts of appeals have suggested that the substitution of 'constitutional' for 'federal' was not intended to alter the pre-AEDPA standard," but "[t]he language of Section 2253(c)(2) makes that view untenable." Brief for the United States as Amicus Curiae at 20 n.11, *Slack* v. *McDaniel*, 529 U.S. 473 (2000) (No. 98-6322). "The reference to a 'constitutional' right in Section 2253(c)(2) requires that the underlying petition for collateral relief raise a constitutional claim, rather than a claim based on a federal statute or treaty . . . ." *Id.* at 20.

> prevents [a habeas petitioner] from establishing that the violation of his Vienna Convention rights prejudiced him. Without a hearing, [a petitioner] cannot establish how the Consul would have advised him, [or] how the advice of his attorneys differed from the advice the Consul could have provided . . . .

Id.

Another conflict involves AEDPA's statute of limitations for habeas claims. Under 28 U.S.C. § 2244(d)(1) (2000), "[a] 1-year statute of limitations shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court." AEDPA's one-year limitations period barred relief in another of the *Avena* cases, that of César Roberto Fierro Reyna (*Avena* case no. 31). *See Fierro* v. *Cockrell*, 294 F.3d 674 (5th Cir. 2002), *cert. denied*, 538 U.S. 947 (2003). Mexico discussed Fierro's case at some length in its Memorial in *Avena*, representing the Fifth Circuit's decision applying the statute of limitations as another instance of a Vienna Convention claim being "denied as 'procedurally defaulted,' without any consideration of its merits." *See* Memorial of Mexico 44 ¶ 112 (June 20, 2003), http://icj-cij.org/icjwww/idocket/imus/imuspleadings/imus_ipleadings_20030620_memorial_03.pdf. The ICJ concluded that the United States had breached its obligations under Article 36(2) with respect to Fierro (in addition to breaching Article 36(1)(a), (b) & (c)). *Avena, supra,* ¶¶ 114, 153(8). AEDPA's statute of limitations has barred relief in other Vienna Convention cases, as well. *See, e.g., Fuentes* v. *Benik*, No. 04-C-763-C, 2005 WL 83830, at *2–*3 (W.D. Wis. Jan. 3, 2005) (holding Vienna Convention claim untimely and alleged recent discovery of claim did not toll one-year limitations period); *Williams* v. *Taylor*, No. CIV.A.02-18-JJF, 2002 WL 1459530, at *3 (D. Del. July 3, 2002) (holding Vienna Convention claim untimely and equitable tolling not applicable). A rule requiring reconsideration of the conviction and sentence of foreign nationals in the light of asserted violations of Article 36 of the Vienna Convention would necessarily require the statute of limitations in § 2244(d)(1) to be set aside in many cases.

Finally, the relief Petitioner seeks would, in many cases, require the filing of a "second or successive habeas corpus application," prohibited by 28 U.S.C. § 2244(b) (2000) except in special circumstances. Section 2244(b)(1) bars the claims of habeas petitioners who presented consular notification claims in prior habeas proceedings and lost. The *LaGrand Case* provides an example of this. In *LaGrand* v. *Stewart*, 170 F.3d 1158, 1161 (9th Cir. 1999), the Ninth Circuit held that Karl LaGrand's Vienna Convention claim, which had been presented in a prior habeas petition and held to be procedurally defaulted, was barred by § 2244(b)(1). The ICJ referred to this decision in its judgment in *LaGrand*, 2001 I.C.J. at 478 ¶ 29.

For those habeas petitioners who did not present their consular notification claims in prior habeas proceedings, a "second or successive" petition is barred unless: (i) this Court announces a new, retroactive "rule of constitutional law," § 2244(b)(2)(A); or (ii) "the factual predicate for the claim could not have been discovered previously through the exercise of due diligence" and the facts would be sufficient to establish that the factfinder would not have found the defendant guilty, § 2244(b)(2)(B). *See, e.g., Villafuerte* v. *Stewart*, 142 F.3d 1124, 1125 (9th Cir. 1998) (holding Vienna Convention claims barred under § 2244(b)(2)(A) and (b)(2)(B)). Only in "rare circumstances" will §

2244(b)(2)'s exceptions apply. *See Mason* v. *Myers*, 208 F.3d 414, 417 (2d Cir. 2000). This AEDPA rule, too, would have to be jettisoned under Petitioner's theory.

In all of these situations, the ICJ's interpretation of Article 36(2) of Vienna Convention creates a conflict with the provisions of AEDPA. The United States ratified the Vienna Convention in 1969 and the Convention entered into force for the United States on December 24, 1969. *See* 21 U.S.T. at 77, 373. To be sure, the judgments in *Avena* and *LaGrand* postdate AEDPA, but they interpret the meaning of the Vienna Convention when it was drafted in 1963, and thus when it entered into force for the United States in 1969. *See Avena, supra*, ¶¶ 86, 124 (discussing the *travaux préparatoires* of the Vienna Convention); *LaGrand*, 2001 I.C.J at 493–94, ¶¶ 75–76 (discussing parties' contentions regarding the *travaux préparatoires*). Accordingly, the relevant date of the Vienna Convention, for purposes of assessing any conflict with a statute, is 1969—when it was ratified and entered into force for the United States. Because AEDPA was adopted over a quarter-century later, AEDPA is "last in date" and must "control" over inconsistent provisions of the earlier Vienna Convention. *Whitney*, 124 U.S. at 194; *Breard*, 523 U.S. at 376.

II. ALTHOUGH THE VIENNA CONVENTION MAY BE SELF-EXECUTING, JUDGMENTS OF THE INTERNATIONAL COURT OF JUSTICE ARE NOT.

A. Judgments of the International Court of Justice Are Not Self-Executing.

Petitioner and his *amici* argue that the Vienna Convention is self-executing. Thus, according to Petitioner, judgments of the ICJ interpreting the Convention must be

enforced in federal court. *See* Pet.'s Br. at 30 ("Medellín's rights under the *Avena* Judgment are enforceable by the courts of the United States without any further executive or legislative action."). Although he seems hesitant to say so explicitly, this is essentially an argument that judgments of the International Court of Justice are self-executing, at least when the ICJ interprets a self-executing treaty. *See id.* at 31–32 n.25 (attempting to distinguish *Committee of U.S. Citizens Living in Nicar.* v. *Reagan*, 859 F.2d 929 (D.C. Cir. 1988)). Petitioner is mistaken.

The Vienna Convention may be self-executing, in the sense that implementing legislation is unnecessary (at least in most instances). The Executive Branch apparently took that position in Senate hearings on ratification of the Convention. *See Torres* v. *Mullin*, 540 U.S. 1035, 1039 (2003) (Breyer, J., dissenting from denial of certiorari) (quoting S. Exec. Rep. 91-9, app. at 5 (1969) (statement of State Department Deputy Legal Adviser J. Edward Lyerly) (Vienna Convention "is entirely self-executive and does not require any implementing or complementing legislation")). The Department of State continues to advise law enforcement officials that "[i]mplementing legislation is not necessary (and the VCCR and bilateral [consular relations] agreements are thus 'self-executing') because executive, law enforcement, and judicial authorities can implement these obligations through their existing powers." U.S. Dep't of State, *Consular Notification and Access: Instructions for Federal, State, and Local Law Enforcement Officials Regarding Foreign Nationals in the United States and the Rights of Consular Officials to Assist Them* 44 (2003) (emphasis added), http://travel.state.gov/pdf/CNA_book.pdf.[3]

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[3] On the other hand, the Executive Branch has taken the position that the Vienna Convention does not create individual rights. *See*

That the Vienna Convention may be self-executing, however, does not *ipso facto* make a judgment of the ICJ interpreting the Convention self-executing. The United States is a party to the Vienna Convention's Optional Protocol Concerning the Compulsory Settlement of Disputes, *done* Apr. 24, 1963, 21 U.S.T. 325, 596 U.N.T.S. 487. Thus, the United States has agreed that "[d]isputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol." *Id.*, art. I, 21 U.S.T. at 326, 596 U.N.T.S. at 488. But under the ICJ Statute, "[t]he decision of the Court has no binding force *except between the parties* and in respect of that particular case." Statute of the International Court of Justice, art. 59, June 26, 1945, 59 Stat. 1055, 1062, 3 Bevans 1179, 1190 (emphasis added). Moreover, "[o]nly states may be parties in cases before the Court." *Id.*, art. 34(1), 59 Stat. at 1059, 3 Bevans at 1186. Thus, although Petitioner's case was discussed in *Avena*, he was not a party in *Avena*, and the judgment *Avena* is not binding between Petitioner and the United States or between

Petitioner and the State of Texas. The judgment in *Avena* is only binding between the United States and Mexico.

Of course, that is not to say that the United States' actions with respect to Petitioner have no impact on its compliance with the judgment in *Avena*; they do. The duty to comply with ICJ judgments principally arises from sources outside the Vienna Convention itself, however. Under Article 94(1) of the United Nations Charter, "[e]ach Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party." U.N. Charter, art. 94(1), June 26, 1945, 59 Stat. 1031, 1051, 3 Bevans 1153, 1175. The problem for Petitioner, however, is that the lower courts have generally treated the provisions of the United Nations Charter and the ICJ Statute as not being self-executing. *See Flores* v. *So. Peru Copper Corp.*, 343 F.3d 140, 157 n.24 (2d Cir. 2003) ("[A]lthough the Charter of the United Nations has been ratified by the United States, it is not self-executing."); *Committee of U.S. Citizens Living in Nicar.* v. *Reagan*, 859 F.2d 929, 938 (D.C. Cir. 1988) (Mikva, J.) (Article 94 of U.N. Charter and ICJ Statute not self-executing); *Frolova* v. *USSR*, 761 F.2d 370, 374–75 (7th Cir. 1985) (*per curiam*) ("We have found no case holding that the U.N. Charter is self-executing . . . .") (Articles 55 and 56 of U.N. Charter not self-executing); *Spiess* v. *C. Itoh & Co. (Am.), Inc.*, 643 F.2d 353, 363 (5th Cir. Unit A Apr. 1981) ("[T]he Charter of the United Nations, although adopted by the United States, is not a self-executing international obligation."), *vacated on other grounds*, 457 U.S. 1128 (1982); *Hitai* v. *INS*, 343 F.2d 466 (2d Cir.) (Article 55 of U.N. Charter not self-executing), *cert. denied*, 382 U.S. 816 (1965); *see also Tel-Oren* v. *Libyan Arab Repub.*, 726 F.2d 774, 809 (D.C. Cir. 1984) (Bork, J., concurring) (Articles 1 and 2 of U.N. Charter not self-executing), *cert. denied*, 470 U.S. 1003 (1985); *People of Saipan* v. *U.S. Dep't of Interior*, 502 F.2d

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United States v. *Li*, 206 F.3d 56, 63 (1st Cir.) (en banc) (quoting U.S. Dep't of State, *Department of State Answers to the Questions Posed by the First Circuit in United States v. Nai Fook Li* at A-1, A-2, A-3 (Oct. 15, 1999), *available at* U.S. Dep't of State, *Digest of United States Practice in International Law 2000*, ch. 2, doc. no. 1, http://www.state.gov/documents/organization/7111. doc), *cert. denied*, 531 U.S. 956 (2000); *see also id.* at 63 n.3 (noting that State Department had not officially addressed whether individual could enforce consular notification through mandamus; Vienna Convention, pmbl., para. 5, 21 U.S.T. at 79, 596 U.N.T.S. at 262 ("*Realizing* that the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of functions by consular posts on behalf of their respective States"). The Fourth Circuit observed in *United States* v. *Al-Hamdi*, 356 F.3d 564 (4th Cir. 2004), that "no [U.S.] court has ever held that the Vienna Convention creates individual rights." *Id.* at 575 n.13.

90, 100 (9th Cir. 1974) (Trask, J., concurring) ("First of all, it appears clear to me that the Charter of the United Nations is not self-executing and does not in and of itself create rights which are justiciable between individual litigants."), *cert. denied*, 420 U.S. 1003 (1975).

Underscoring the non-self-executing nature of Article 94, paragraph 2 of the Article provides a mechanism for enforcing compliance:

> If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.

Id., art. 94(2), 59 Stat. at 1051, 3 Bevans at 1175. As one commentator has observed, "[b]y indicating an alternative remedy for non-compliance, it is unlikely that a court would find the ICJ provision of the Charter to be self-executing because the Charter itself contemplates that the resolution of ICJ disputes ha[s] been committed to the Security Council." Julian G. Ku, *The State of New York Does Exist: How the States Control Compliance with International Law*, 82 N.C. L. Rev. 457, 516 (2004); *see also* David M. Reilly & Sarita Ordonez, *Effect of the Jurisprudence of the International Court of Justice on National Courts*, 28 N.Y.U. J. Int'l L. & Pol'y 435, 481 (1997) ("[C]ourts have pointed to the non-self-executing nature of the U.N. Charter to support the proposition that enabling legislation is required before private individuals can claim a cause of action in a domestic court based on a judgment obtained before the ICJ.").

Indeed, the judgments in both *LaGrand* and *Avena* reinforce the conclusion that those judgments are not self-executing. In *LaGrand*, the ICJ concluded that, if the United States failed in its consular notification obligation under Article 36(1)(b) of the Vienna Convention and a German national were "convicted and sentenced to severe penalties," then under Article 36(2),

> it would be incumbent upon the United States to allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in the Convention. *This obligation can be carried out in various ways. The choice of means must be left to the United States.*

2001 I.C.J. at 514 ¶ 125 (emphasis added); *see also id.* at 516 ¶ 128(7) ("[S]hould nationals of the Federal Republic of Germany nonetheless be sentenced to severe penalties, without their rights under Article 36, paragraph 1(b), of the Convention having been respected, the United States of America, *by means of its own choosing*, shall allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in that Convention.") (emphasis added).

In *Avena*, the ICJ rejected Mexico's request that the court order the United States to vacate the convictions and sentences of the Mexican nationals at issue in that case. *See Avena, supra*, ¶¶ 116–125. The ICJ stated that "[i]t is not to be presumed, as Mexico asserts, that partial or total annulment of conviction or sentence provides the necessary and sole remedy." *Id.* ¶ 123. The court similarly rejected Mexico's contention that the United States be required to exclude any statements or confessions obtained before consular notification occurred. *Id.* ¶¶ 126–127. On the other hand, the court rejected the United States' argument that executive clemency afforded adequate "review and reconsideration" under *LaGrand*. *Id.* ¶ 143. The ICJ concluded "that it is the judicial process that is suited to this task" of review and reconsideration, not clemency proceedings. *Id.* ¶ 141. In the end, however, the ICJ reaffirmed "that the appropriate reparation in this case consists in the obligation of the United States of America to provide, *by means of its own choosing*, review and reconsideration of the convictions and sentences . . . by taking account both of the violation of the rights set forth in Article 36 of the Convention and of paragraphs 138 to 141 of this Judgment . . . ." *Id.* ¶ 153(9) (emphasis added). By leaving the process of "review and reconsideration" to the United States "by means of its own choosing," the ICJ essentially recognized that its judgment should not be considered self-executing, i.e., that some action regarding the means of "review and reconsideration" needs to be taken by the United States first.

B. Treating Judgments of the International Court of Justice as Non-Self-Executing Avoids Serious Constitutional Questions.

Interpreting judgments of the ICJ as not being self-executing not only comports with the U.N. Charter and the ICJ Statute, it avoids serious constitutional questions regarding international delegations and national sovereignty. As Justice O'Connor observed in an address in 1995, "the vesting of certain adjudicatory authority in international tribunals presents a very significant constitutional question in the United States. Article III of our Constitution reserves to federal courts the power to decide cases and controversies, and the U.S. Congress may not delegate to another tribunal 'the essential attributes of judicial power.'" Sandra Day O'Connor, *The Federalism of Free Nations*, 28 N.Y.U. J. Int'l L. & Pol'y 35, 42 (1997) (quoting *Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. 833, 851 (1986)). One legal commentator has observed that "treating the decisions and actions of international institutions as non-self-executing within the U.S. legal system . . . will reduce many of the constitutional concerns associated with international delegations without significantly affecting the United States's ability to participate in international institutions." Curtis A. Bradley, *International Delegations, the Structural Constitution, and Non-Self-Execution*, 55 Stan. L. Rev. 1557, 1595–96 (2003); *see id.* at 1572–73 (discussing the ICJ's decisions in *LaGrand* and *Vienna Convention on Consular Relations* (Para. v. U.S.), 1998 I.C.J. 248 (Apr. 9) (provisional measures order regarding stay of execution for Angel Francisco Breard)).

The constitutional questions that would arise from treating the judgment in *Avena* as a self-executing, binding rule of decision in Petitioner's case are troubling. The power to create binding judicial precedent is one of the classic, "essential attributes of judicial power." *See Anastasoff* v. *United States*, 223 F.3d 898, 900–04 (8th Cir.) ("We conclude therefore that, as the Framers intended, the doctrine of precedent limits the 'judicial power' delegated to the courts in Article III."), *vacated as moot*, 235 F.3d 1054 (8th Cir. 2000) (en banc). Assigning the ICJ the "judicial power" of creating binding rules of decision for lower federal courts would violate Article III's assignment of that power to this Court. *See* U.S. Const. art. III, § 1, cl. 1 ("The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."); Joshua A. Brook, *Federalism and Foreign Affairs: How To Remedy Violations of the Vienna Convention and Obey the U.S. Constitution, Too*, 37 U. Mich. J.L. Reform 573, 597–98 (2004) ("Although the case can be made that the U.N Charter and the Statute of the ICJ may require domestic courts to enforce ICJ judgments, such an interpretation would probably run afoul of the Constitution's Article III provisions establishing the hierarchy of the federal judiciary."). Certainly, "a treaty permitting the ICJ to *overturn* determinations of the federal courts would be unconstitutional." A. Mark Weisburd, *International*

Courts and American Courts, 21 Mich. J. Int'l L. 877, 896 (2000) (emphasis added).

Separate and apart from Article III, treating judgments of the ICJ as self-executing, binding rules of decision for state courts would raise serious federalism concerns. In *Breard*, the Executive Branch recognized that "Our Federalism," *Younger* v. *Harris*, 401 U.S. 37, 44 (1971), "imposes limits on the federal government's authority to interfere with the criminal justice system of the States." Brief for the United States as Amicus Curiae 51, *Breard* v. *Greene*, 523 U.S. 371 (1998) (No. 97-1390). Treating ICJ judgments as self-executing could effectively permit the ICJ to commandeer state governments to enforce its judgments against the wishes of those governments and state officials and in violation of state-court precedent. Such "commandeering" would run afoul of this Court's holdings in *Printz* v. *United States*, 521 U.S. 898, 933 (1997), and *New York* v. *United States*, 505 U.S. 144, 176 (1992). This Court has observed, albeit in a different context, that

> [a] power to press a State's own courts into federal service to coerce the other branches of the State . . . is the power first to turn the State against itself and ultimately to commandeer the entire political machinery of the State against its will and at the behest of individuals. Such plenary federal control of state governmental processes denigrates the separate sovereignty of the States.

Alden v. *Maine*, 527 U.S. 706, 749 (1999). If the Constitution does not authorize the Federal Government to "commandeer" state governments, it surely does not authorize the ICJ to do so.[4] By interpreting judgments of the ICJ as

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[4] Nor, it should be noted, has the ICJ presumed to have such power, given its acknowledgement of the need for further action to enforce its judgments in *LaGrand* and *Avena*.

non-self-executing, however, these federalism concerns, as well as Article III delegation issues, can be avoided.

III. THIS COURT SHOULD DEFER TO THE POLITICAL BRANCHES TO DECIDE HOW TO COMPLY WITH THE JUDGMENTS IN *LAGRAND* AND *AVENA*.

Under the judgment in *Avena*, the United States must choose how to provide "review and reconsideration of the convictions and sentences" at issue. *Avena*, *supra*, ¶ 153(9). As a delicate matter of foreign policy, that task should be left to the Executive Branch and Congress, at least in the first instance. As Justice Jackson observed,

> the very nature of . . . decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil.

Chicago & So. Air Lines v. *Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948).

Petitioner asserts that this Court need not stay its hand or otherwise defer. Some will surely argue that this Court's modification of the procedural default rule would constitute the United States' choice as to how to comply with *Avena* just as much as a statute or executive order would. Such an argument neglects, however, the extent to which the later-enacted AEDPA bars the kind of "review and reconsideration" Petitioner seeks. Even if this Court were to modify the procedural default rule, that alone would not provide Petitioner with the relief he seeks. He would still need Congress to expand the grounds for granting a certificate of appealability in § 2253(c)(2). Other foreign nationals would need Congress to modify or toll AEDPA's statute of limitations, § 2244(d)(1), others would require congressional authorization to file second or successive habeas petitions, § 2244(b), and still others would need special permission for an evidentiary hearing, § 2254(e)(2).

Given these statutory barriers, which must take precedence over earlier treaty obligations, it would be better to leave the question of implementation of *Avena* to the political branches. There, the Executive and Congress can consider *all* of the issues raised by *Avena* together, rather than piecemeal. Those issues would be numerous, e.g.: (1) Should "review and reconsideration" take place as part of federal habeas review, or should the States be allowed the option of addressing the issue first in state collateral review proceedings?; (2) What kind of showing, if any, should foreign nationals be required to make to demonstrate that they are not "sandbagging," i.e., that they (and their lawyers) were genuinely ignorant of their Article 36 consular notification rights?; (3) What penalties (other than death) are sufficiently "severe" to qualify for "review and reconsideration" under *Avena*? The political branches can work toward a solution that protects and balances the United States' sovereignty interests, the States' interests in finality and the efficient administration of criminal justice, and foreign nationals' interests in consular notification in an equitable fashion—all the while bearing in mind the important ramifications such a solution would have for United States citizens living and traveling abroad.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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IN THE
Supreme Court of the United States

JOSE ERNESTO MEDELLIN,
PETITIONER,
v.

DOUG DRETKE, Director,
Texas Department of Criminal Justice
Institutional Division,

RESPONDENT.

On Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

BRIEF OF THE ALLIANCE DEFENSE FUND, AS *AMICUS CURIAE*, SUPPORTING RESPONDENT

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INTEREST OF AMICUS CURIAE

This *amicus curiae* brief is filed on behalf of the Alliance Defense Fund.[1]

The **ALLIANCE DEFENSE FUND** ("ADF") is a not-for-profit public interest organization. ADF provides funding, as well as strategic planning and training, to attorneys and organizations protecting religious civil liberties. Its membership includes hundreds of lawyers and numerous public interest law firms. ADF has advocated for rights of Americans under the United States Constitution in numerous significant cases throughout the United States, having been directly or indirectly involved in at least 500 cases and legal matters, including numerous cases before the United States Supreme Court.

The Alliance Defense Fund works to preserve and protect religious liberty. It has particular knowledge helpful to the Court in this case concerning the social and legal impact of the authoritative use of international law.

CONSENT TO FILE BRIEF

Petitioner and Respondents, through their counsel of record, consented to the filing of this Brief *Amicus Curiae* in support of Respondents. Their confirmations of consent are on file with the Clerk of the Court.

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[1] In accordance with Supreme Court Rule 37(6), *amicus* certifies that this brief was authored entirely by Counsel of Record for *amicus* and that no part of the brief was authored by any attorney for a party. No person or entity other than *amicus curiae* or its counsel provided a monetary contribution to the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

A forum state's procedural rules govern treaty implementation. *Breard v. Greene,* 523 U.S. 371, 375-77 (1998).

The Vienna Convention expressly provides that the rights it grants "shall be exercised in conformity with the laws and regulations of the receiving State" so long as those laws "enable full effect to be given" to the Convention's purposes. Vienna Convention on Consular Relations, *opened for signature* April 24, 1963, art. 36(2), 21 U.S.T. 77, 101, 596 U.N.T.S. 261.

This Court held in *Breard* that the procedural default rules developed under the United States Constitution accomplish those purposes. Congress further affirmed and reinforced those procedural default rules with its Anti-Terrorism and Effective Death Penalty Act of 1996, Pub.L. 104-132, Apr. 24, 1996, 110 Stat. 1214, a statute Congress enacted subsequent to the ratification of the Treaty at issue.

Under the Supremacy Clause, U.S. Const. art. VI, cl. 2, the procedural default rule adopted under the United States Constitution and by act of Congress, as interpreted by decisions of this Court, is the supreme law of the land, over a contrary decision by the International Court of Justice (ICJ). The ICJ cannot dictate United States domestic criminal procedural laws, in a manner contrary to the United States Constitution and act of the American Congress, especially where the Treaty provision construed by the ICJ precedes the Congressional enactment of statutory terms inconsistent with the ICJ's construction.

To impose the ICJ's interpretation upon the United States subordinates and alters the United States Constitution, deprives Congress of its constitutional authority to legislate, and deprives the United States of sovereignty. Neither the United States Constitution, nor the natural law of nations on which it was founded, permit such an extraordinary result.

Because the procedural default rule bars review of Petitioner's claim, no case or controversy continues to exist. Petitioner's remaining legal arguments are, therefore, moot and need not be decided. *See generally United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 397 (1980).

Amicus, therefore, urges this Court to uphold rather than overrule its recent precedent in *Breard* and affirm the Court of Appeals.

ARGUMENT

Preliminarily, your *amicus* takes no position in the instant case on the merits or demerits of capital punishment. This *amicus* brief addresses the authority of decisions of international tribunals construing treaty terms when such a construction is contrary to the United States Constitution and acts of Congress, as interpreted by decisions of this Supreme Court.

THE UNITED STATES CONSTITUTION AND ACTS OF CONGRESS (AS INTERPRETED BY DECISIONS OF THIS SUPREME COURT AND ENACTED SUBSEQUENT TO THE RATIFICATION OF THE VIENNA CONVENTION) HAVE SUPREMACY OVER CONTRARY DECISIONS OF THE INTERNATIONAL COURT OF JUSTICE.

Petitioner claims the rule of decision for U.S. courts in this case is an International Court of Justice holding that: (1) American procedural default rules cannot bar review of

Petitioner's Vienna Convention Claim; (2) the Vienna Convention establishes individual rights for the Petitioner which the government violated; and (3) U.S. courts must review and reconsider the petitioner's conviction and sentence taking account of the violation of Petitioner's rights under the Vienna Convention. *See Avena and Other Mexican Nationals (Mexico v. United States of America)* 2004 I.C.J. 1 (Judgment of March 31); *LaGrand Case (Germany v. United States of America)*, 2001 I.C.J. 466 (Judgment of June 27).

Petitioner is wrong.

A. American Procedural Default Rules Bar Review of Petitioner's Vienna Convention Claim.

The United Nations adopted the Vienna Convention on Consular Relations and Optional Protocols on April 24, 1963. Vienna Convention on Consular Relations, *opened for signature* April 24, 1963, art. 36(2), 21 U.S.T. 77, 596 U.N.T.S. 261. The United States Senate ratified the Vienna Convention and the Optional Protocols to it[2] on October 22, 1969. 115 Cong. Rec. 30,997 (1969). Article 36 of the Convention states the rights pertinent to Petitioner's claims in this case. On their face, those rights appear to have a purpose of facilitating consular activity in receiving states.[3]

"[A]bsent a clear and express statement to the contrary, the procedural rules of the forum State govern the implementation of the treaty in that State." *Breard v. Greene*, 523 U.S. 371, 375 (1998) (citing *Sun Oil Co. v. Wortman*, 486 U.S. 717, 723 (1988)); *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 700 (1988); and *Societe Nationale Industrielle Aerospatiale v. United States Dist. Court for S. Dist. of Iowa*, 482 U.S. 522, 539 (1987).

Indeed, "the Vienna Convention itself" permits and embodies American law's procedural default principle, by expressly providing that Convention rights "'shall be exercised in conformity with the laws and regulations of the receiving State'" so long as "'said laws and regulations . . . enable full effect to be given to the purposes for which the rights accorded under this Article are intended.'" *Breard*, 523 U.S. at 375 (citing and quoting Vienna Convention, *supra*, 21 U.S.T. at 101).

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[2] Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, *opened for signature* April 24, 1963, art. I, 21 U.S.T. 325, 596 U.N.T.S. 487.

[3] The pertinent part of Article 36 provides:

1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:

(a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State; (b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph; (c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action. Vienna Convention on Consular Relations and Optional Protocol on Disputes, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261.

In *Breard v. Greene*, this Court held that the procedural default rules, developed under the United States Constitution, accomplish those purposes–and that Vienna Convention claims, like Constitutional claims, can be procedurally defaulted. 523 U.S. at 375. The now axiomatic rule developed by this Court under the United States Constitution is that claims of error in criminal proceedings "must first be raised in state court in order to form the basis for relief in habeas," whether in capital or other cases. *Breard*, 532 U.S. at 375 (citing *Wainwright v. Sykes*, 433 U.S. 72 (1977)).

Breard further recognized that Congress reinforced those procedural default rules when it, subsequent to the ratification of the Treaty, enacted the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub.L. 104-132, Apr. 24, 1996, 110 Stat. 1214. *Breard*, 532 U.S. at 376. Under this statute, a habeas petitioner, claiming his incarceration violates "treaties of the United States," generally is not entitled to an evidentiary hearing where he "fail[s] to develop the factual basis of [the] claim in State court proceedings." 28 U.S.C. § 2254(a), (e)(2).

Although treaties are the supreme law of the land, so, too, is the Constitution itself, as well as an Act of Congress. *Breard*, 523 U.S. at 376. "We have held 'that an Act of Congress . . . is on a full parity with a treaty, and that when a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null.'" *Id.* at 376 (citing and quoting *Reid v. Covert*, 354 U.S. 1, 18 (1957) (plurality opinion)) (citing also *Whitney v. Robertson*, 124 U.S. 190, 194 (1888) (stating when treaty and federal statute conflict, "the one last in date will control the other")). Enforcement of treaty provisions does not fall within the purview of international tribunals. Rather, a treaty depends "on the interest and honor of the governments which are parties to it" for enforcement. *Head Money Cases*, 112 U.S. 580, 598 (1884).

The opposing briefs are wont in their quotation of the Constitution's Supremacy Clause to omit anything other than its reference to treaties–critical and telling omissions. The full Clause provides:

> *This Constitution, and the Laws of the United States which shall be made in Pursuance thereof*; and all Treaties made, or which shall be made, under the Authority of the United States, *shall be the supreme Law of the Land*; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, cl. 2 (emphasis added).

While the Vienna Convention was adopted in 1969, Congress subsequently enacted, and the President signed, the AEDPA in 1996. A petitioner's "ability to obtain relief based on violations of the Vienna Convention is subject to this subsequently enacted rule, just as any claim arising under the United States Constitution would be." *Breard*, 523 U.S. at 376. No substantial, constitutional basis exists on which to alter it. *See* Sandra Day O'Connor, *Federalism of Free Nations, in International Law Decisions in National Courts* 13, 19 (Thomas M. Franck & Gregory H. Fox eds., 1996) (citing *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 851 (1986) (stating that "the vesting of certain adjudicatory authority in international tribunals presents a very significant constitutional question") (noting "Article III of our Constitution reserves to federal courts the power to decide cases and controversies, and the U.S. Congress may not delegate to another tribunal 'the essential attributes of judicial power. . . .'")).

In his Texas state court trial proceeding, Petitioner never claimed his incarceration violated the Vienna Convention. Petitioner raised the Vienna Convention Claim for the first time in his habeas petition filed in 2001 and amended in 2002. It is undisputed that, under American Constitutional and statutory law, Petitioner therefore procedurally defaulted on this claim. Under the Supremacy Clause of the United States Constitution, this is, therefore, the rule of law United States courts must apply in the instant case. Because the procedural default rule bars review of Petitioner's claim, no case or controversy continues to exist. Petitioner's remaining legal arguments are, therefore, moot and need not be decided. *See generally United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 397 (1980).

B. CONTRARY DECISIONS OF THE ICJ ARE NOT CONTROLLING, AND DEEMING SUCH DECISIONS THE SUPREME LAW OF THE LAND HAS POTENTIAL TO CREATE A CONSTITUTIONAL CRISIS OF EPIC PROPORTIONS.

Notwithstanding the lucid language of the AEDPA, and this Court's holding in *Breard*, Petitioner contends United States courts must apply, as the rule of decision in this case, contrary holdings of the ICJ. Petitioner contends an Optional Protocol to the Treaty provides the ICJ with jurisdiction to discern rights under the treaty, find violations of those rights, and then impose remedies on the United States and its courts. The Optional Protocol actually states much less, merely providing that "[d]isputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a

Party to the present Protocol." Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, *opened for signature* April 24, 1963, art. I, 21 U.S.T. 325, 596 U.N.T.S. 487.

Nothing credible in the record suggests that the President's negotiation and the Senate's ratification of the Optional Protocol included surrendering the sovereignty of the United States to the ICJ. To be sure, the politically accountable branches of the Republic have agreed to permit the ICJ to hear "[d]isputes arising out of the interpretation or application of the Convention." *Id.* Nothing in this plain language authorizes the ICJ to discern rights under the treaty, find violations of those rights, and then impose remedies on the United States and its courts. Not since John Marshal penned *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), has a court of justice attempted to assume so much power in American government as the ICJ has in the instant case–but this time the judges doing so are not even appointed by the President or confirmed by the Senate.

The American people trust their courts to faithfully interpret the expression of the popular American will, and resolve our disputes fairly under the rule of law. It is this trust of the people, standing alone, that gives legitimacy to a Federal court's power of judicial review. Thus, in a constitutional republic dividing power between an elected executive, an elected legislature, and an independent judiciary, the continued legitimacy of democratic institutions rests in part upon the unelected judiciary not usurping the power of politically accountable branches of government.

In this regard, the facts of this case create the potential for a constitutional crisis of epic proportions. Here, Petitioner asks an unelected Supreme Court to reject well-established American constitutional and statutory law as the rule of decision in this case. In its place, Petitioner asks this Court to deem as the Supreme Law of this Land, an unelected foreign court's judicial promulgation. Such a course surrenders the sovereignty of the United States to the International Court of Justice and ignores the right of the people to themselves govern. Because the United States Congress is the most politically accountable branch of government, it will likely notice the impropriety of this course.

James Madison expressed his wonder at the considerable extent to which the Philadelphia Convention reached agreement on the Constitution with these words: "It is impossible for the man of pious reflection not to perceive in it, a finger of that Almighty hand which has been so frequently and signally extended to our belief in the critical stages of the revolution." *The Federalist* No. 37 at 236-238 (J.E. Cooke ed., 1961). Indeed, the Constitution's adoption was the people's acceptance of a moral view of government. The right and natural sovereign authority the Constitution provides for these United States, as a part of that moral view, ought not to be disturbed. It is apparent throughout *The Federalist* that the United States Constitution was written with a particular view in mind of ordinary principles of causality–that certain motives and opportunities of constituent interests ought (in view of the nature of man) to be treated by certain forms of government. The judicial submission of the people of the United States to an international rule of decision to which the people's elected representatives in Congress have not on their own submitted them is no part of those Constitutional principles.

The perils of the judiciary submitting the United States to the authority of international norms which Congress has not adopted or authorized are many and well documented. World judicial systems are immensely varied, creating "promiscuous opportunity" to cite authority for whatever propositions the courts wish. Richard Posner, *No Thanks, We Already Have Our Own Laws*, Aug. 2004 Legal Affairs 40, 41; John Leo, *Creeping Transnationalism*, U.S. News & World Report, July 21, 2003, at 58 (observing a problem with judges defying American law by spotting "emerging world consensus"); Donald E. Childress, III, *Using Comparative Constitutional Law to Resolve Domestic Federal Questions*, 53 Duke L.J. 193, 217, 219-220 (2003) (proposing that international comparative analysis overturns American legal culture and constitutionalism).

Citation of foreign decisions becomes "one more form of judicial fig-leafing" of which we have too much already, when the real influences on judicial decision-making have nothing whatever to do with the study of foreign decisions. Posner, *supra*, at 42. Indeed, foreign decisions "emerge from a complex socio-historico-politico-institutional background" of which federal judges "are almost entirely ignorant." *Id.* Courts are not all pursuing the same enterprise. A federal court interpreting the United States Constitution may not be doing anything like that which a foreign court does interpreting different documents. *See* Michael D. Ramsey, *International Materials and Domestic Rights: Reflections on Atkins and Lawrence*, 98 Am. J. Int'l L. 69, 73 (2004) (noting that this practice threatens to undermine constitutional law).[4] American constitutional law and international human rights law emerge from distinctly different source material. *See* Roger P. Alford, *Federal Courts, International Tribunals, and the Continuum of Deference: A Postscript on Lawrence v. Texas*, 44 Va. J. Int'l L. 913, 919 (2004).

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[4] Professor Ramsey gives the example that the *Dudgeon* European court which this Court cited in *Lawrence v. Texas*, 539 U.S. 558 (2003), was deciding whether an anti-sodomy provision was "necessary" within the terms of the European Convention for the Protection of Human Rights and Fundamental Freedoms, whereas this Court in *Lawrence* was deciding whether Texas's anti-sodomy law was "reasonable" under the Constitution. Ramsey at 73-74.

And so for instance, relying on foreign authority to declare new fundamental constitutional rights shatters prior prudential constraints on substantive due process theories. *Id.* at 925 (citing Robert C. Post, *Forward: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 Harv. L. Rev. 4, 96 (2003). It further improperly elevates political documents like treaties and executive agreements (when used as interpretive sources) above the Constitution, contrary to the Supremacy clause. Roger P. Alford, *Misusing International Sources to Interpret the Constitution*, 98 Am. J. Int'l L. 57, 61-2 (2004).

Citation of foreign decisions certainly is counter to popular rule by the people and undemocratic. Posner, *supra*, at 42; Alford, *Misusing International Sources*, *supra*, at 57. In fact, citation of foreign decisions is often an express strategy of law professors and interest groups to find "a more sympathetic set of interpretive sources than existed domestically." Ramsey, *supra*, at 70 (citing Harold H. Koh, *Paying "Decent Respect" to World Opinion on the Death Penalty*, 35 U.C. Davis L. Rev. 1085, 1109-1129 (2002)). Because the Court does not have the institutional resources and skills to engage in its own comparative and empirical analysis of international sources, it relies unduly on misshapen advocacy. *See* Alford, *Misusing International Sources*, *supra*, at 64-65. Selection of foreign sources then becomes non-empirical and even arbitrary except in relationship to the desired outcome.[5] Ramsey, *supra*, at 72-

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[5] Professor Ramsey queries why the Robinson brief on which this Court relied in *Lawrence* cited the law of Israel rather than India, for instance. *Id.* at 73.

73. Moreover, the choice of issues on which to employ comparativism is itself unprincipled and therefore seems directed to the Court's ends. *See* Alford, *Misusing International Sources*, *supra*, at 67-68 (citing Mary Ann Glendon, *Abortion and Divorce in Western Law* 24-25, 145-54 (1987) (noting that, comparatively speaking, the United States' abortion policy is singular among all of the world's countries)). "Gone are decisions that turn on objective facts or value judgments of others. What matters is the Court's own conception of liberty."[6] Alford, *Federal Courts*, *supra*, at 925. Enumeration of rights created by international tribunals not only abandons the Constitution's text and history but also the experience and history of the Nation. Alford, *Federal Courts*, *supra*, at 926.

Hamilton and Madison in *The Federalist* more than adequately expressed the root of these concerns: that human passion and interest tend to corrupt the virtue of imperial rulers–even, we add, when they wear the robes of the judiciary. Hamilton wrote in *The Federalist* No. 6, at 31 (J.E. Cooke ed., 1961), that momentary passion is a stronger influence over human conduct than remote justice and in *The Federalist* No. 22, at 142 (J.E. Cooke ed., 1961), that those elevated to power may be compensated to betray their trust. Similarly, Madison wrote in *The Federalist* No. 49, at 340 (J.E. Cooke ed., 1961), that a nation of philosophers is "as little to be expected as the philosophical race of kings wished for by Plato" and in *The Federalist* No. 55, at 374 (J.E. Cooke ed., 1961), that "passion never fails to wrest the scepter from reason" in bodies "of whatever character composed."

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[6] Professor Alford also mentions Justice Harlan's dissent in *Poe v. Ullman*, 367 U.S. 497, 542 (1961), writing of a jurisprudence "where judges . . . felt free to roam where unguided speculation might take them." Alford, *Federal Courts*, *supra*, at 925 n.78.

The Constitution's delicate balance reflected the Founders' views that there is both "a degree of depravity in mankind which requires a certain degree of circumspection and distrust" but also other qualities "which justify a certain portion of esteem and confidence." *The Federalist* No. 55, at 378 (James Madison) (J.E. Cooke ed., 1961). The Constitution gives no indication that the people intended under these truths to grant ultimate power to those who would divine law from the statements and resolutions of non-representative international bodies. The people ceded only those natural rights which any people must cede so as to vest a necessary government with adequate powers, *The Federalist* No. 2, at 8 (John Jay) (J.E. Cooke ed., 1961), with those powers yet limited by "the transcendent law of nature and of nature's God . . . to which all such institutions must be sacrificed," *The Federalist* No. 43, at 297 (James Madison) (J.E. Cooke ed., 1961).

C. THIS COURT SHOULD NOT CRAFT JUDICIAL REMEDIES FOR THE VIOLATION OF INTERNATIONAL NORMS.

Several federal circuits and state courts have acknowledged that the Vienna Convention does not create individual rights. *See, e.g., United States v. Duarte-Acero*, 296 F.3d 1277, 1281-82 (11th Cir.), *cert. denied*, 537 U.S. 1038 (2002); *United States v. De La Pava*, 268 F.3d 157, 164-65 (2d Cir. 2001); *United States v. Emuegbunam*, 268 F.3d 377, 394 (6th Cir. 2001), *cert. denied*, 535 U.S. 977 (2002); *United States v. Jimenez-Nava*, 243 F.3d 192, 198 (5th Cir.), *cert. denied*, 533 U.S. 962 (2001); *United States v. Li*, 206 F.3d 56, 60-66 (1st Cir.) (en banc), *cert. denied*, 531 U.S. 956 (2000); *see also Bell v. Commonwealth*, 563 S.E.2d 695, 706 (Va. 2002), *cert. denied*, 537 U.S. 1123 (2003); *State v. Navarro*, 659 N.W.2d 487, 493 (Wis. Ct. App.), *rev. denied*, 661 N.W.2d 101 (Wis. 2003); *State v. Martinez-Rodriguez*, 33 P.3d 267, 274 (N.M. 2001), *cert. denied*, 535 U.S. 937 (2002).

These courts properly relied, and relied heavily, on *Breard* to require (as a prerequisite to obtaining review) a showing of prejudice, such as proof that the violations impacted trial or deprived a defendant of a constitutional right. *See, e.g., United States v. Ortiz*, 315 F.3d 873, 878 (8th Cir. 2002); *United States v. Minjares-Alvarez*, 264 F.3d 980, 986-87 (10th Cir. 2001); *United States v. Chanthadara*, 230 F.3d 1237, 1256 (10th Cir. 2000), *cert. denied*, 534 U.S. 992 (2001); *United States v. Cordoba-Mosquera*, 212 F.3d 1194, 1196 (11th Cir. 2000), *cert. denied sub nom., Arnulfo Zuniga v. United States*, 531 U.S. 1131 (2001); *United States v. Pagan*, 196 F.3d 884, 890 (7th Cir. 1999), *cert. denied*, 530 U.S. 1283 (2000); *United States v. Ademaj*, 170 F.3d 58, 67-68 (1st Cir.), *cert. denied*, 528 U.S. 887 (1999). This Court has clearly, and repeatedly, held that treaties cannot supersede individual rights protected under the United States Constitution. *See, e.g., Boos v. Barry*, 485 U.S. 312 (1988) (upholding First Amendment freedoms); *Reid v. Covert*, 354 U.S. 1 (1957) (upholding Sixth Amendment rights). If this Court cedes part of the Constitution in the instant case, it might expect new petitioners before this Court citing international norms to stifle free expression of religious views, and the free exercise of religion in general.

Indeed given this state of affairs, this Court in *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739 (2004), just recently recognized appropriate limitations on the domestic use of international norms Congress has not expressly adopted. *See* Nelson Miller, William Wagner, & Steven Fitschen, *Federal Courts Enforcing International Norms: The Salubrious Effect of* Sosa v. Alvarez-Machain, 2 Regents J. Int'l L. 71 (2005).

Contrary to Petitioner's implications concerning *Sosa*, *see* Pet. Brief at 24, this Court in *Sosa* rejected an invitation to construe broadly the international norms under which aliens could bring cases in the federal district courts. This Court did so by adopting the standard that international norms (those cognizable under the Alien Tort Claims Act) must be "defined with a specificity comparable to the features of the 18th-century paradigms" at the time of the Act's 18th century adoption. 124 S. Ct. at 2761-62. In deciding *Sosa*, this Court pointed to the 1820 case of *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 163-180, n.a (1820), noting that it illustrated the specificity with which the law of nations defined piracy. 124 S. Ct. at 2765. The majority in *Sosa* further cited recent Alien Tort Claims Act cases limiting jurisdiction to claims based on only a "handful of heinous actions" of "specific, universal, and obligatory" character. 124 S. Ct. at 2765 (citing and quoting *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980) (stating "the torturer has become – like the pirate and slave trader before him – *hostis humani generis*, an enemy of all mankind")); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 781 (D.C. Cir. 1984) (Edwards, J., concurring) (stating section 1350 should reach only "a handful of heinous actions – each of which violates definable, universal and obligatory norms"); *In re Estate of Marcos Human Rights Litigation*, 25 F.3d 1467, 1475 (9th Cir. 1994) (holding cognizable "violations of international law must be of a norm that is specific, universal, and obligatory"). Based on these authorities, this Court in *Sosa* concluded that "federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when" the Act was enacted. 124 S. Ct. at 2765.

The Court's reasons in *Sosa* for limiting the domestic uses of international law parallel some of those recognized by the above commentators. They included that given today's materialist jurisprudence, "a judge deciding in reliance on an international norm will find a substantial element of discretionary judgment in the decision." 124 S. Ct. at 2762; *see also id.* at 2764 ("As described before, we now tend to understand common law not as a discoverable reflection of universal reason but, in a positivistic way, as a product of human choice."). Judges, in other words, no longer find themselves constrained by the natural law principles inherited from Aristotle, Cicero, and Locke, and followed by the Founding Fathers. Institutional legitimacy is the issue, especially where the Court's "general practice has been to look for legislative guidance before exercising innovative authority over substantive law." *Id.* at 2762.

This Court also recognized in *Sosa* that when federal courts "craft remedies for the violation of new norms of international law," they "raise risks of adverse foreign policy consequences" and thus must act, "if at all, with great caution." *Id.* at 2763 (citing *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 813 (D.C. Cir. 1984) (Bork, J., concurring) (expressing doubt that "our courts [should] sit in judgment of the conduct of foreign officials in their own countries with respect to their own citizens")). This Court in *Sosa* acknowledged that it has "no congressional mandate to seek out and define new and debatable violations of the law of nations," adding that recent "indications of congressional understanding of the judicial role in the field have not affirmatively encouraged greater judicial creativity." 124 S. Ct. at 2763. *Sosa* continued: "Several times, indeed, the Senate has expressly declined to give the federal courts the task of interpreting and applying international human rights law," giving as an example "when its ratification of the International Covenant on Civil and Political Rights declared that the substantive provisions of the document were not self-executing." *Id.* (citing 138 Cong. Rec. 8071 (1992)).[7]

Indeed, in *Sosa* the Court expressly rejected the plaintiff's reliance on the International Covenant on Civil and Political Rights, because it was not self-executing: "although the Covenant does bind the United States as a matter of international law, the United States ratified the Covenant on the express understanding that it was not self-executing and so did not itself create obligations enforceable in the federal courts." 124 S. Ct. at 2767. The Court further rejected the plaintiff's claim that the UN's 1948 Universal Declaration on Human Rights established an international norm on which he was entitled to rely: "But the Declaration does not of its own force impose obligations as a matter of international law." 124 S. Ct. at 2767.[8] The Court further rejected the plaintiff's argument that the Declaration and Covenant, together with a survey of national constitutions,[9] a decision of the ICJ,[10] and decisions of the federal courts[11]

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[7] The Covenant's citation is International Covenant on Civil and Political Rights (Covenant), Dec. 19, 1996, 999 U.N.T.S. 171.

[8] The Declaration's full citation is the Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 (1948).

[9] The Court noted that the plaintiff had cited "Bassiouni, Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions, 3 Duke J. Comp. & Int'l L. 235, 260-261 (1993)[,]" which the Court noted showed a consensus only "at a high level of generality." 124 S. Ct. at 2768 n.27.

[10] The Court noted that the plaintiff had cited "a case from the International Court of Justice, *United States v. Iran*, 1980 I.C.J. 3, 42," which the Court determined "involved a different set of international norms and mentioned the problem of arbitrary detention only in passing[,]" and moreover, involved a far longer and harsher detention. 124 S. Ct. at 2768 n.27.

[11] The Court noted that the plaintiff had cited a collection of cases in his brief at page 49, note 50, 124 S. Ct. at 2768 n.27, which the brief shows included: "*See, e.g., Martinez v. City of Los Angeles*, 141 F.3d 1373, 1384 (9th Cir. 1998); *Siderman de Blake v. Argentina*, 965 F.2d at 717;

"attained the status of binding customary international law" on the right he claimed. 124 S. Ct. at 2767-68. The Court concluded that the plaintiff "certainly cites nothing to justify the federal courts in taking his broad rule as the predicate for a federal lawsuit, for its implications would be breathtaking." *Id.* at 2768.

Thus, this Court's holding in *Sosa* certainly contradicts Petitioner's argument that the United States is bound by an ICJ decision which is not based in the literal terms of the Vienna Convention, and which Congress has, in essence, rejected by enacting the Anti-Terrorism and Effective Death Penalty Act. If *Sosa* is properly read in this limiting manner (and the opinion gave other indications that it should be[12]), then it does much to restore the federal courts' legitimacy in the customary international law arena.

D. ADOPTING PETITIONER'S POSITION FUNDAMENTALLY ALTERS THE CONSTITUTION.

When in *Sosa* this Court showed its historical understanding of the law of nations, it acknowledged and embraced other important limiting distinctions. "In the years of the early Republic, this law of nations comprised two principal elements" including only:

Comm. of U.S. Citizens Living in Nicaragua v. Reagan, 859 F.2d 929, 940 (D.C. Cir. 1988); *De Sanchez v. Banco Central de Nicaragua*, 770 F.2d 1395, 1397 (5th Cir. 1985); *Xuncax v. Gramajo*, 886 F. Supp. 162, 184-85 (D. Mass 1995); *Paul v. Avril*, 901 F. Supp. 330, 335 (S.D. Fla. 1994); *Forti v. Suarez Mason*, 672 F. Supp. 1531, 1541 (N.D. Cal. 1987)." Brief for Respondent Alvarez-Machain 49n.50 (2004 WL 419421).

[12] For instance, the Court stated expressly, "And we now adhere to a conception of limited judicial power first expressed in reorienting federal diversity jurisdiction, see *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L.Ed. 1188 (1938), that federal courts have no authority to derive 'general' common law." 124 S. Ct. at 2764.

> (1) "the general norms governing the behavior of national states with each other" as demonstrated by executive and legislative agreements, plus
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> (2) "a body of judge-made law regulating the conduct of individuals situated outside domestic boundaries and consequently carrying an international savor."

124 S. Ct. at 2755-56.

As to the latter judge-made laws, *Sosa* held that it was international law in this limited sense that the Court had intended in *The Paquete Habana*, when it ruled that the status of offshore fishing vessels in wartime arose from "'ancient usage among civilized nations, beginning centuries ago, and gradually ripening into a rule of international law . . . .'" 124 S. Ct. at 2756 (citing and quoting *The Paquete Habana*, 175 U.S. 677, 686 (1900)). In short, *Sosa* put *The Paquete Habana's* statements regarding international law, which some federal courts and commentators had over-used to promote international law, back in their proper historical and legal context.

The *Sosa* Court then further moored the domestic use of customary international law to its proper context, by citing Blackstone's *Commentaries* and de Vattel's *The Law of Nations* for their clear limiting definitions given the law of nations.[13] 124 S. Ct. at 2756. The Court concluded in *Sosa* that the overlap of these international rules governing individuals outside domestic boundaries, with the norms of state relationships, constituted the final sphere within which customary international law operated. To illustrate, the Court drew the examples (from Blackstone and de Vattel) of

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[13] Citations here to Emmerich de Vattel's *The Law of Nations* are to the Joseph Chitty edition published in 1883, though the first edition of de Vattel's work appeared in 1758.

piracy, the violation of safe conduct, and an assault on an ambassador, concluding from these sources that it "was this narrow set of violations of the law of nations" which "was probably on [the] minds of the men" who drafted the Act, 124 S. Ct. at 2756 – and not incidentally, the Constitution.

The Court was correct in its reading of de Vattel's *The Law of Nations*–the seminal work read and largely followed by the Founders. To de Vattel (as well as the writers of the United States Constitution), there "certainly exists a natural law of nations," but that law of nations is one that binds nation-states in their relations, rather than defining the rights of individuals within each nation. De Vattel, *supra* note 13, at vii (noting "the natural law of nations is a particular science, consisting in a just and rational application of the law of nature to the affairs and conduct of nations or sovereigns"). "The moderns are generally agreed in restricting the appellation 'the law of nations' to that system of right and justice which ought to prevail between nations or sovereign states." *Id.* at viii. The law of nations is not intended to mean a world community of one law, governing the rights and duties of individuals within their individual nations. Rather, the law of nations operates by consent between nation-states, governing not individual rights but the international conduct of nations. "The celebrated Grotius understands it to be a system established by the common consent of nations. . . ." *Id.*

Again in de Vattel's terminology, the law of nations defines not the "*internal* law" but the "*external* obligation" of a nation, "reserving the *internal* law for the direction of their own consciences." *Id.* at ix; *see also id.* at lxii. True, "It is essential to every civil society (*civiati*) that each member have resigned a part of his right to the body of the society and that there exist in it an authority capable of commanding all the members, of giving them laws, and of compelling those who should refuse to obey." *Id.* at xiii. But on the other hand (de Vattel immediately continued), "Nothing of this kind can be conceived or supposed to subsist between nations. Each sovereign state claims, and actually possesses an absolute independence on all the others." *Id.* "To this we may add, that independence is even necessary to each state, in order to enable her properly to discharge the duties she owes to herself and to her citizens, and to govern herself in the manner best suited to her circumstances." *Id.* at xiv.

Thus, the law of nations arising by the consent of nation-states "cannot impose any obligation except on those particular nations who have, by long use, given their sanction to its maxim. . . ." *Id.* at xv. "The law of nations is the law of sovereigns." *Id.* at xvi. "[T]he body of the nation, the State, remains absolutely free and independent with respect to all other men, and all *other* Nations, as long as it has not voluntarily submitted to them." *Id.* at lvi. De Vattel continued:

> As a consequence of that liberty and independence, it exclusively belongs to each nation to form her own judgment of what her conscience prescribes to her, – of what she can or cannot do, – of what it is proper or improper for her to do: and of course it rests solely with her to examine and determine *whether she can perform any office for another nation without neglecting the duty which she owes to herself.* In all cases, therefore, in which a nation has the *right* of judging what her duty requires, no other nation can compel her to act in such or such particular manner: for any attempt at such compulsion would be an infringement on the liberty of nations.

Id. at lxi-lxii.

As a sovereign republic, then, the United States "derives all its powers directly or indirectly from the great body of people" with those powers "administered by persons holding" representative offices. *The Federalist* No. 39 at 251 (James Madison) (J.E. Cooke ed., 1961). The Founders appreciated that though the Republic ought to be sufficiently large to minimize the prospect of majority factions developing around unjust causes, yet the Republic must be of such a size that the people's representatives could gather to govern–large but not too large, and certainly not a single world community. Madison wrote Jefferson on October 24, 1787, "As in too small a sphere oppressive combinations may be too easily formed agst. The weaker party; so in too extensive a one, a defensive concert may be rendered too difficult against the oppression of those entrusted with the administration." *Papers of James Madison,* Volume 10, p. 214, *quoted in*, Morton White, *Philosophy, The Federalist, and the Constitution* 140 (1987). Madison reiterated in *The Federalist* No. 14, at 85 (J.E. Cooke ed., 1961), that the natural limit of a republic was "that distance from the center, which will barely allow the representatives of the people to meet as often as may be necessary for the administration of public affairs." The purpose in limiting that distance was to not deny the people's representatives from defending the people against a tyrannical administration.

Thus there was in the minds and understanding of those who drafted and advocated the adoption of the Constitution (such as Hamilton, Jay, and Madison), and those (such as Blackstone, de Vattel, and Grotius) who informed them, the clear conception that the United States would stand sovereign in the world, with the people's representatives determining both its internal laws as well as the circumstances under which it would accede in its international relations to the interests of other nations. Under this understanding, the laws of this United States are subject to the norms, treaties, and conventions of other nations only when Congress expressly so provides by authorizing legislation, and certainly not when rules developed under the United States Constitution and acts of Congress (not to mention the treaty language itself) contradict international interpretations.

CONCLUSION

The Convention ratified by the United States expressly provides that the rights it grants must "be exercised in conformity with the laws and regulations of the receiving State." Such laws and regulations are a well established part of this nation's Constitutional and statutory law–and are therefore, the only proper law to apply as the rule of decision in this case. Thus, the American procedural default rule bars review of Petitioner's claim.

By the adoption of the Constitution the American people ceded certain of their inviolable natural rights to the government. The people did not, however, cede those rights to foreign judges exercising authority inconsistent with that authorized by the people's representatives and the Constitution itself. The President negotiated and the Senate ratified an Optional Protocol which, on its face, agrees to limit jurisdiction of the ICJ to hearing "[d]isputes arising out of the interpretation or application of the Convention." In doing so, these representatives of the American people did not agree to authorize the ICJ to discern rights under the treaty, find violations of those rights, and then impose remedies on the United States and its courts–which is exactly what the ICJ did in this case. This Court should, therefore, reject Petitioner's invitation to anoint the ICJ's judicial promulgation as the Supreme Law of this Land. Failure to do so does nothing less than surrender the sovereignty of the

United States to an international tribunal and ignores the right of the people to govern.

Finally, because the procedural default rule bars review of Petitioner's claim, no case or controversy continues to exist. Petitioner's remaining legal arguments are, therefore, moot and should not be decided. *See generally United States Parole Commn. v. Geraghty*, 445 U.S. 388, 397 (1980).

For these reasons, your *amicus* urges this Court to uphold its precedent in *Breard*, and affirm the Court of Appeals.

Respectfully submitted,

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16

No. 04-5928

IN THE

Supreme Court of the United States

JOSE ERNESTO MEDELLIN,

Petitioner,

v.

DOUG DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF THE AMERICAN BAR ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

The International Court of Justice ruled in *Avena* that Texas' failure to advise Petitioner of his right to consular services resulted in a violation of both Mexico's and Petitioner's rights under the Vienna Convention on Consular Relations, and that application of the procedural default doctrine to deny a United States court the ability to reconsider Petitioner's conviction and sentence in light of that decision would itself violate the Convention. In light of that decision, Amicus will address the following questions:

1. Must United States courts treat the International Court of Justice's interpretations of the Vienna Convention as authoritative and not just persuasive?

2. Should a federal court apply the procedural default doctrine based on the violation of a state procedural rule to bar Petitioner's Vienna Convention claim, thereby disregarding the International Court of Justice's *Avena* Judgment?

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INTEREST OF AMICUS CURIAE[1]

Pursuant to this Court's Rule 37.3, amicus curiae American Bar Association ("ABA" or "Amicus") respectfully submits this brief in support of the position that United States courts should give effect to the International Court of Justice's *Avena* Judgment and review Petitioner's conviction and sentence, rather than foreclose review based upon Petitioner's failure to comply with a state-created procedural rule.

STATEMENT OF INTEREST

The ABA is the world's largest voluntary professional membership organization and the leading organization of legal professionals in the United States. The ABA's membership of more than 405,000 attorneys spans all 50 states and includes attorneys in private law firms, corporations, nonprofit organizations, government agencies, and prosecutorial and public defender offices, as well as legislators, law professors, and students.[2]

Among the ABA's goals are "promot[ing] meaningful access to legal representation and the American system of justice for all persons regardless of their economic or social condition" and "advanc[ing] the rule of law in the world."

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[1] Pursuant to Rule 37.6, *amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. The parties have filed letters consenting to the filing of this brief with the Clerk of the Court.

[2] Neither this brief nor the decision to file it should be interpreted to reflect the views of any member of the judiciary associated with the American Bar Association. No inference should be drawn that any member of the Judicial Division Council has participated in the adoption or endorsement of the positions of this brief. This brief was not circulated to any member of the Judicial Division Council prior to filing.

The ABA has long recognized the importance of promoting and adhering to mechanisms for the peaceful resolution of international disputes. In 1947, the ABA House of Delegates adopted a policy recommending that the United States "in order to further the administration of international justice ... refer[] all international questions or disputes susceptible of being decided on the basis of law, which cannot be settled by direct negotiations, to the International Court of Justice or to arbitral tribunals." 72 REPORTS OF THE AMERICAN BAR ASSOCIATION 102-03 (1947). In the same year, the ABA House of Delegates adopted a resolution expressing the ABA's "great satisfaction" that the United States had accepted the jurisdiction of the International Court of Justice "as binding upon it." *Id.* at 377.

The ABA House of Delegates reaffirmed its support for resolving international disputes in the International Court of Justice when it adopted a policy in 1994 recommending that the United States Government present a declaration recognizing that the International Court of Justice has "compulsory" jurisdiction in all legal disputes concerning "the interpretation of a treaty," "any question of international law," or "the nature or extent of the reparation to be made for the breach of an international obligation."

In 1998, the ABA House of Delegates adopted a resolution specifically recognizing the importance of complying with the Vienna Convention on Consular Relations and urging "federal, state, territorial and local law enforcement authorities to adopt a warning of rights similar to the '*Miranda*' standard, advising foreign nationals of their right to consular assistance pursuant to Article 36 of the Vienna Convention."

While the ABA takes no position on the death penalty as a general matter, it is especially concerned about the effective representation of criminal defendants who have been or might be sentenced to death.[3] The ABA has adopted numerous policies concerning the administration of justice and the effective representation of criminal defendants. For example, in 1990, the ABA House of Delegates adopted a resolution that in death penalty cases

> [f]ederal courts should not rely on state procedural bar rules to preclude consideration of the merits of a claim if the prisoner shows that the failure to raise the claim in a state court was due to the ignorance or neglect of the prisoner or counsel or if the failure to consider such a claim would result in a miscarriage of justice.

One of the several ABA entities that focus on legal issues related to capital punishment is the ABA Death Penalty Representation Project, which recruits, trains, and supports volunteer counsel to represent death row inmates who lack lawyers.

In 1989, the ABA House of Delegates adopted Resolution 122, *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* ("*ABA Death Penalty Guidelines*"), which were designed to "amplify previously adopted Association positions on effective assistance of counsel in capital cases [and to] enumerate the minimal resources and practices necessary to provide effective assistance of counsel."[4] The Guidelines were based on the experiences of those who handled post-conviction cases on collateral review and the lessons learned from the pattern of inadequate, unprepared, and under-financed counsel who represented at trial those accused of capital crimes. The ABA called upon each death penalty jurisdiction to adopt the *ABA Death Penalty Guidelines.*

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[3] *See, e.g., ABA Standards for Criminal Justice: Providing Defense Services* ("*ABA Providing Defense Services Standards*"), Standard 5-1.2 cmt. at 11 (3d ed. 1992) ("American Bar Association resolutions have frequently and consistently taken positions supporting the provision of quality representation by counsel in capital cases."); ABA House of Delegates Resolution 107, Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (2003); American Bar Ass'n, *Toward a More Just and Effective System of Review in State Death Penalty Cases,* 40 AM. U. L. REV. 1, 13 (1990).

Indeed, consistent with both its position with respect to the Vienna Convention and the United States' international obligations, as well as its concern with promoting meaningful access to the justice system, the ABA has adopted guidelines for attorneys representing foreign nationals. *See* Guideline 10.6 – Additional Obligations of Counsel Representing a Foreign National, adopted by the House of Delegates in February 2003. The guidelines instruct that at every stage of a case, counsel "should make appropriate efforts to determine whether any foreign country might consider the client to be one of its nationals." Unless predecessor counsel has already done so, an attorney representing a foreign national is instructed to "immediately advise the client of his or her right to communicate with the relevant consular office," to "obtain the consent of the client to contact the consular office," and then to immediately contact the consular office to inform it of the client's detention or arrest.

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[4] *See also ABA Providing Defense Services Standards,* Standard 5-1.2 cmt. at 12 ("These guidelines are incorporated by reference into the [*ABA Providing Defense Services Standards*]."); ABA Standards for Criminal Justice: Prosecution Function and Defense Function ("*ABA Prosecution Function and Defense Function Standards*"), Standard 4-1.2(c) (3d ed. 1993) ("Defense counsel should comply with the [*ABA Death Penalty Guidelines*].").

The ABA appears as *amicus curiae* because the questions presented in this case have serious implications for the stability of the rule of law throughout the world and for the availability of meaningful access to the American system of justice for foreign nationals prosecuted in American courts.

SUMMARY OF ARGUMENT

In 1963, at the height of the Cold War, the United States signed the Vienna Convention on Consular Relations. Apr. 24, 1963, 21 U.S.T. 77 ("Vienna Convention" or "Convention"). Article 36 of the Convention guarantees to all United States citizens abroad and to foreign nationals in this country that if they are arrested outside their home country: (1) law enforcement officials will tell them without delay that they may have their nation's consul informed of their arrest, and (2) if they consent to notification, the law enforcement entity will promptly advise consul of their arrest. The United States played a leading role in negotiating the wording of Article 36. *See* Report of the United States Delegation to the Vienna Conference on Consular Relations, reprinted in Sen. Exec. E, 91st Cong., 1st Sess., May 8, 1969, at 41, 59-61. To ensure the faithful and consistent application of these important protections, the United States also proposed and advocated for the dispute settlement provision that became the companion Optional Protocol. *Id.* at 72-73. The Optional Protocol provides for compulsory jurisdiction by the International Court of Justice ("ICJ") over all signatory nations to resolve any disputes concerning the interpretation of the Convention's provisions. *See* Optional Protocol, 21 U.S.T. 325, art. I.

Once the Vienna Convention and Optional Protocol were ratified by the Senate, they became binding on the United States as a whole and, under the Supremacy Clause, preemptive of any conflicting state laws. Nevertheless, when

Texas law enforcement authorities arrested Petitioner Jose Ernesto Medellin Rojas in connection with two murders, he was not advised of his right to contact the Mexican consul even though he informed the authorities that he was born in Mexico and that he was not a United States citizen. *See* Petition for Writ of Certiorari at 8, *Medellin v. Dretke* (No. 04-5928). Mr. Medellin was therefore unable to take advantage of the valuable assistance Mexican consular officers routinely give capital defendants. This assistance typically includes providing funding for experts and investigators, gathering mitigating evidence, contacting and translating for Spanish-speaking family members, and most importantly, ensuring that Mexican nationals are represented by competent and experienced defense counsel.[5]

Instead, Mr. Medellin was left with a court-appointed lead counsel who was suspended from the practice of law at the time of the investigation and trial and who performed extremely poorly. *Id.* at 9. In addition to failing to determine and assert the rights of his client under the Vienna Convention, Mr. Medellin's counsel failed to strike jurors who indicated that they would automatically impose the death penalty, and called no witnesses at the guilt phase of trial. *Id.* After Mr. Medellin was convicted of capital murder, the

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[5] *See, e.g.*, Michael Fleischman, Note, *Reciprocity Unmasked: The Role of the Mexican Government in Defense of Its Foreign Nationals in United States Death Penalty Cases*, 20 Ariz. J. INT'L & COMP. LAW 359, 366-74 (2003) (describing the history and successes of Mexico's consular assistance program); Raymond Bonner, *U.S. Bid to Execute Mexican Draws Fire*, N.Y. TIMES, Oct. 30, 2000, at A20 (reporting that the legal attaché at the Mexican embassy said that in the two prior years he had persuaded prosecutors in four states not to seek the death penalty in murder cases and that, altogether, Mexican consular officials had intervened in an average of 3 death penalty cases per month between December 1994 and October 2000, with the ultimate result that in nearly half of those cases prosecutors did not proceed with a capital prosecution).

only expert witness the defense called during the penalty phase was a psychologist who had never met Mr. Medellin. *Id.* Mr. Medellin was subsequently sentenced to death. Mexican consular authorities only learned of Mr. Medellin's detention after the Texas Court of Criminal Appeals had affirmed his conviction and sentence. *Id.* at 10.

Mexico filed an application with the International Court of Justice on behalf of itself and 54 of its citizens, including Petitioner, to enforce the Vienna Convention against the United States. After receiving extensive written and oral submissions from Mexico and the United States, the ICJ ruled that Texas' failure to advise Petitioner of his right to consular services resulted in a violation of both Mexico's and Petitioner's rights under the Convention. *See Case Concerning Avena and Other Mexican Nationals* (Mex. v. U.S.), 2004 I.C.J. 128 (Mar. 31) ("*Avena*") ¶¶ 106, 153(4)-(7). Although the ICJ denied Mexico's request for annulment of the convictions and sentences, *id.* ¶ 123, the Court held that United States courts must provide review and reconsideration of the convictions and sentences tainted by the violations it had found. *Id.* ¶¶ 121, 128-34. The ICJ also specifically held that applying procedural default doctrines to bar consideration of the Mexican nationals' Vienna Convention claims would itself violate the Vienna Convention. *Id.* ¶¶ 112-13.[6]

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[6] The *Avena* Judgment built on and strengthened the ICJ's earlier judgment in the *LaGrand Case*, a case brought by Germany against the United States also alleging violations of the Vienna Convention. (Germany v. U.S.), 2001 I.C.J. 104 (June 27) ("*LaGrand*"). Unlike in *Avena*, by the time the ICJ ruled in *LaGrand*, both of the German nationals in question had been executed. The ICJ held in *LaGrand* that: (1) Article 36 of the Vienna Convention provides "individual rights" to foreign nationals; (2) applying procedural default rules to prevent detained individuals from challenging their convictions and sentences on the ground that their

(Cont'd)

In the proceedings below, however, the United States Court of Appeals for the Fifth Circuit held that judicially created procedural default rules barred federal courts from reviewing Petitioner's conviction or sentence. 371 F.3d 279-80 (5th Cir. 2004). Because this case goes to the very core of the United States' commitment to honor the rule of law adopted when the United States signed and ratified the Vienna Convention and its Optional Protocol, and because the Fifth Circuit's decision would effectively deny foreign nationals and their nation-states meaningful federal review of their treaty rights, its decision should be reversed.

The federal policies underlying the court-made procedural default rules are not advanced by applying those rules to claims arising under the Vienna Convention. In the traditional habeas corpus case, the procedural default doctrine serves to ensure respect for state court procedural rules. In contrast, cases involving Vienna Convention claims implicate the federal government's plenary and paramount interest in the conduct of foreign relations. The risk to international relations is particularly acute where, as here, an individual state's procedural rule may be used to evade a binding and authoritative decision of the ICJ that favors one of the United States' treaty partners. Moreover, unlike the ordinary case in which procedural default rules are designed to prevent gamesmanship by counsel, defendants and their attorneys are generally unaware of the existence of Vienna Convention rights. Failure to raise them because of sheer ignorance cannot be the result of a strategic choice. Such a rule also would not unduly interfere with the efficient administration of federal courts.

This Court's per curiam opinion in *Breard v. Greene*, 523 U.S. 371 (1998), does not require application of the procedural default doctrine in this case. *Breard*'s determination that the procedural default doctrine could bar that petitioner's Vienna Convention claim was based on assumptions about the Convention that the ICJ's authoritative interpretation in *Avena* has now shown to be incorrect and on a statutory provision that does not apply to this case. The policy implications of this case also differ from those of *Breard*.

Enforcement of the ICJ's *Avena* Judgment is critical to promoting the rule of law throughout the world and to protecting United States citizens' rights under the Convention. The manner in which foreign nationals are treated in domestic courts can have broad international and domestic consequences, and these matters are soundly committed by the Constitution to the judgment of the federal government. Moreover, in light of the ICJ's authoritative interpretation of the Vienna Convention, a decision of this Court that would prevent federal courts from giving effect to that decision would severely undermine international confidence in the United States' commitment to the Optional Protocol and would invite breaches by other treaty partners.

(Cont'd)

rights under Article 36 of the Vienna Convention had been violated itself violated the Vienna Convention; and (3) if the United States failed to comply with Article 36 in future cases involving German nationals subjected to severe penalties, it must "allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in the Convention." *LaGrand* ¶¶ 77, 90-91, 125.

ARGUMENT

I. The federal policies underlying the court-made federal procedural default rules do not support denial of a federal forum for enforcement of international treaty obligations in light of the federal government's plenary power over foreign relations, and the minimal risk to state criminal processes.

The procedural default doctrine is a jurisprudential rule crafted by the federal courts to protect the integrity of state court proceedings.[7] It was fashioned to promote three principally domestic goals. First, the procedural default doctrine promotes federal-state comity by precluding federal courts from hearing federal habeas claims that were not previously raised in accordance with state procedural rules, absent a showing of cause and prejudice. *Wainwright v. Sykes*, 433 U.S. 72, 90-91 (1977); *Reed v. Ross*, 468 U.S. 1, 11 (1984) (explaining that considerations of comity and concerns for the orderly administration of criminal justice motivate the procedural default doctrine); *Coleman v. Thompson*, 501 U.S. 722, 730-32 (1991) (explaining that "concerns of comity and federalism" underlie procedural default rules). Second, the procedural default doctrine prevents gamesmanship or "sandbagging" by defendants and/or defense lawyers, who might otherwise "take their chances on a verdict of not guilty in a state trial court with the intent to raise their [federal] claims in a federal habeas court if their initial gamble does not pay off." *Sykes*, 433 U.S. at 89. Third, like other limits on the ability of federal courts to grant habeas relief, the

doctrine reduces the burdens habeas cases place on the federal courts. *See Murray v. Carrier*, 477 U.S. 478, 487-88 (1986) (refining the procedural default doctrine with the explicit goal of minimizing the burden on federal habeas courts); *cf. Stone v. Powell*, 428 U.S. 465, 491 n.31 (1976) (explaining the decision to eliminate Fourth Amendment claims from the scope of federal habeas review by stating that "resort to habeas corpus . . . results in serious intrusions on values important to our system of government" including "the most effective utilization of limited judicial resources"). Because these policies must give way to Congress' decision that U.S. courts must enforce Vienna Convention obligations as interpreted by the ICJ, and because the traditional policies supporting the procedural default doctrine are diminished when they implicate duties owed by the United States to foreign nations under the Convention, this Court should give effect to the ICJ's *Avena* Judgment, and enforce its interpretation of U.S. treaty obligations.

A. In cases implicating the United States' treaty obligations under the Vienna Convention, the balance of federal and state interests tips more heavily toward federal interests than when only internal state procedural rules and domestic law are at stake.

1. The power to conduct international affairs and the authority to enter treaties are granted exclusively to the federal government by the Constitution, and, under the Supremacy Clause, treaties plainly preempt contrary state laws.

In the arena of international relations, federal interests are at their height, and they are exclusive of state interests. *See, e.g., American Ins. Ass'n v. Garamendi*, 539 U.S. 396,

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[7] *See Dretke v. Haley*, 541 U.S. 386, __, 124 S. Ct. 1847, 1853 (2004) (referring to the exceptions to the procedural default doctrine as "judge-made rules"); Patrick E. Higginbotham, *Reflections on Reform of § 2254 Habeas Petitions*, 18 Hofstra L. Rev. 1005, 1014 (1990) ("[R]espect for state procedural default rules is a judge-made doctrine, not directly drawn from any express statutory provision.").

413 (2003) ("concern for uniformity in this country's dealings with foreign nations . . . animated the Constitution's allocation of the foreign relations power to the National Government") (internal quotation marks omitted). The Constitution entrusts the federal government with "full and exclusive responsibility for the conduct of affairs with foreign sovereignties." *Hines v. Davidowitz*, 312 U.S. 52, 63 (1941). As this Court has emphasized, "[o]ur system of government is such that the interest of the cities, counties and states, no less than the interest of the people of the whole nation, imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference." *Id.*; *see also Board of Trustees of University of Illinois v. United States*, 289 U.S. 48, 59 (1933) ("In international relations and with respect to foreign intercourse and trade the people of the United States act through a single government with unified and adequate national power."); The Federalist No. 80, at 500 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961) ("[T]he peace of the *whole* ought not to be left at the disposal of a *part*"). Applying the procedural default doctrine to avoid enforcement of the United States' Vienna Convention obligations would allow state and local procedural rules to impair foreign relations.

It is precisely because of the importance of ensuring that the entire country speak with one voice in international relations and that the United States be able to fulfill its international obligations that the Constitution explicitly makes treaties "the supreme Law of the Land," overriding "any Thing in the Constitution or Laws of any State to the Contrary."[8] U.S. Const. art. VI, cl. 2. "It is the declared duty" of both state and federal judges, under the Supremacy Clause, "to determine any Constitution, or laws of any State, contrary to [a] treaty . . . made under the authority of the United States, null and void." *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 237 (1796); *see also Hauenstein v. Lynham*, 100 U.S. 483, 489 (1880) ("It is the declared will of the people of the United States that every treaty made by the authority of the United States shall be superior to the Constitution and laws of any individual State."). The transcripts of the Senate hearings on ratification of the Vienna Convention make clear that the Senate understood that the Convention would preempt any conflicting state laws. S. Exec. Rep. No. 91-9, 91st Cong., 1st Sess. 2 & 5 (appendix) at 18 (statement by Deputy Legal Adviser J. Edward Lyerly) (1969) ("[T]o the extent that there are conflicts in . . . state laws[,] the Vienna Convention, after ratification, would govern."); William J. Aceves, *The Vienna Convention on Consular Relations: A Study of Rights, Wrongs, and Remedies*, 31 Vand. J. Transnat'l L. 257, 267-68 (1998).

There is no doubt that Texas's procedural rules, if enforced through the application of the federal procedural default doctrine to Mr. Medellin's federal habeas petition, would conflict with the Vienna Convention. The United States agreed to be bound by the ICJ's interpretations of the Vienna Convention when it signed and ratified the Optional Protocol to the Convention. *See* Optional Protocol, art. I (providing that disputes "arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice."). In its *Avena* Judgment, the ICJ held that application of the procedural default rules to preclude review of Vienna Convention violations prevents "'full effect [from being] given to the purposes for which the rights accorded under this article are intended,' and thus violate[s] paragraph 2 of Article 36." *Avena*, ¶ 113. The Vienna Convention, as authoritatively interpreted, therefore prohibits state procedural rules from blocking review of Vienna Convention claims brought by foreign nationals such as Mr. Medellin. It would violate both the Supremacy Clause and the intent of the Senate that ratified the Vienna Convention and the Optional Protocol to allow state procedural rules to do so.

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[8] The United States signed the Vienna Convention and its Optional Protocol on April 24, 1963, and the Senate unanimously ratified both instruments on October 22, 1969. *See* 115 Cong. Rec. 30,997 (Oct. 22, 1969). Accordingly, the Vienna Convention indisputably has the force of a treaty under the Constitution.

2. Unlike federal constitutional rights that may be procedurally defaulted, here the right belongs not only to the defendant but also to the defendant's home country, thereby affecting international relations and heightening the federal interests at stake.

When a state arrests or prosecutes a citizen of a country that is a signatory to the Vienna Convention and fails to comply with the Convention's requirements, that failure violates not only the defendant's rights, but also the rights of the defendant's home country. *See, e.g.*, *LaGrand Case* (Germany v. U.S.), 2001 I.C.J. 104 (June 27) ("*LaGrand*") ¶ 74 ("[W]hen the sending State is unaware of the detention of its nationals due to the failure of the receiving State to provide the requisite consular notification without delay, . . . the sending State has been prevented for all practical purposes from exercising its rights under Article 36."); *Avena*, ¶ 102 (describing the United States as precluding Mexico "from exercising its right" under one provision of the Convention). Those rights include the rights "to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation." Vienna Convention, art. 36 ¶ 1(c).

When a state fails to honor a treaty-partner's Vienna Convention rights, the federal government must deal with the consequences. The resulting tensions in international relations can be substantial. *See, e.g.*, Brian Knowlton, *Execution Pits Mexico Against U.S. – Fox Echoes World On Death Penalty*, INT'L HERALD TRIB., Aug. 16, 2002, at 1 (reporting that Mexican President Vicente Fox canceled a trip to visit President George W. Bush's Texas ranch to protest Texas's execution of a Mexican national who had not been told of his Vienna Convention rights). As this very case demonstrates, state officials' violations of the Vienna Convention may cause the United States to be brought before the ICJ and ultimately to receive a judgment against it. *See Avena*; *see also LaGrand.*

The impact on international relations distinguishes Vienna Convention rights from other federal rights that have been subjected to procedural default rules. Generally, if an American defendant violates a state procedural rule in attempting to assert an individual federal right, only that individual's rights are affected. In such situations, this Court has determined that federal-state comity generally requires that any claim to that right be considered procedurally defaulted. *Wainwright v. Sykes*, 433 U.S. 72, 90-91 (1977). The balance of federal and state interests tips much more heavily toward federal interests, however, when the right at issue belongs not just to the defendant, but also to his home country. It would violate the federal government's constitutionally protected interest in international relations to apply that doctrine to hold that the right of a sovereign treaty-partner – which was never informed of the arrest and detention of one of its citizens – may be waived by the procedural mistakes of an individual attorney.

B. Sandbagging is not a concern in this context because when a defendant fails to raise the claim that his Vienna Convention rights have been violated, it is usually due to ignorance, not strategy.

Article 36 of the Vienna Convention requires United States authorities to tell an arrested foreign national, "without delay," that he may have his nation's consul informed of the arrest. ¶ 1(b).[9] When such information is not provided, it is very likely that the arrested individual will be unaware of the right to consular notification. His lawyer is also highly likely to be unaware of that right because most lawyers have received no training in international law. *See* Claudio Grossman, *Building the World Community: Challenges to Legal Education and the WCL Experience*, 17 Am. U. Int'l L. Rev. 815, 825 (2002) (reporting that "the contemporary law student is only slightly more likely to take an international law course than her counterpart in 1912" and that as of 2002, there were "still no questions on any bar exam concerning international law, no mandatory international law courses, and generally no first-year exposure to the study of international law."); John A. Barrett, Jr., *International Legal Education in U.S. Law Schools: Plenty of Offerings, But Too Few Students*, 31 Int'l Law. 845, 854 (1997) ("[A]t most law schools across the United States, fewer than 20 percent of graduates ever take a course in international law."). Nor has the federal government created any mechanism for notifying defendants and their lawyers of consular rights under the Vienna Convention. Simply put, defendants and their attorneys cannot make strategic decisions to leave out arguments about which they are utterly unaware. *Cf. Kimmelman v. Morrison*, 477 U.S. 365, 385 (1986) (explaining that counsel's failure to file a timely suppression motion could not have been based on "strategic considerations" because counsel was unaware of the potential basis for the motion after failing to conduct any pretrial discovery).

The fact that there is no federally-imposed system in place for informing defendants or their attorneys of consular rights under the Vienna Convention further distinguishes those rights from the other federal rights that may be procedurally defaulted. For example, the right to receive *Miranda* warnings, which is subject to the procedural default doctrine,[10] also involves the defendant's right to be informed of other rights. *Miranda v. Arizona*, 384 U.S. 436, 479 (1966). But since this Court's decision in *Miranda*, the *Miranda* warnings have "become embedded in routine police practice to the point where [they] have become part of our national culture." *Dickerson v. United States*, 530 U.S. 428, 443 (2000). No such national practice has developed to inform arrested individuals of their Vienna Convention rights. The federal government has made efforts to encourage state and local law enforcement officials to comply with the Vienna Convention, but has not completed the task.[11] The lack of a

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[9] The ICJ found that the detaining authorities' duty to provide information to an individual about consular rights "arises once it is realized that the person is a foreign national, or once there are grounds to think that the person is probably a foreign national." *Avena*, ¶ 63. The court suggested that because law enforcement authorities do not always know whether someone is a foreign national, every arrested individual could be told, along with the *Miranda* warnings, that "should he be a foreign national, he is entitled to ask for his consular post to be contacted." *Id.* ¶ 64.

[10] *See Ylst v. Nunnemaker*, 501 U.S. 797, 806 (1991) (applying the procedural default doctrine to bar a *Miranda* claim on federal habeas).

[11] In January, 1998, the State Department published a booklet entitled "Consular Notification and Access: Instructions for Federal, State and Local Law Enforcement and Other Officials Regarding (Cont'd)

national practice compounds the problems associated with not informing an individual defendant directly of those rights, because the defendant is unlikely to have heard of the rights from others who have been arrested or from television or movies.[12]

(Cont'd)
Foreign Nationals in the United States and the Rights of Consular Officials to Assist Them" and a reference card designed to be carried by individual arresting officers. *See LaGrand*, ¶ 121. By June, 2001, 60,000 copies of the booklet and 400,000 copies of the pocket card had been distributed to federal, state and local law enforcement and judicial officials. *Id.* The State Department has reported that by December, 2003, these members had grown to 100,000 and 600,000, respectively. *See* Adam Liptak, *Mexico Awaits Hague Ruling on Citizens on Death Row*, N.Y. TIMES, Jan. 16, 2004, at A1. The State Department does not deny, however, that Vienna Convention violations continue. *See id.* Apparently, the fact that the federal government has informed state authorities about the Vienna Convention does not mean that state authorities will pass that information on to defendants and their attorneys. Indeed, as this case demonstrates, unless federal courts enforce Vienna Convention rights on habeas, states will be able to violate the Vienna Convention with impunity.

[12] It is clear that Mr. Medellin's failure to raise his Vienna Convention claim was not the result of a strategic decision. At the time of Mr. Medellin's trial in 1994, *Wainwright v. Sykes* had already been decided, and no federal court had held that an exception to the procedural default rules should be made for habeas claims under the Vienna Convention or any other treaty. Indeed, reflecting the state of the law prior to the ICJ's decision in *Avena*, this Court found in *Breard v. Greene* that Vienna Convention rights could be procedurally defaulted. 523 U.S. 371, 375-76 (1998). Given the state of the law at the time of Mr. Medellin's trial, he should have expected that if he failed to raise a claim regarding his Vienna Convention rights, he would waive the claim both for the purposes of his state court proceedings and for any future federal habeas proceedings. There is therefore no reason to believe that Mr. Medellin was engaging in gamesmanship or was making any other strategic choice when he failed to raise a claim regarding the violation of his Vienna Convention rights at trial.

C. Giving effect to the *Avena* decision would not create a significant burden for federal courts.

Giving effect to the *Avena* decision would not open the floodgates to habeas claimants. Going forward, if the federal courts enforced Vienna Convention rights on habeas more frequently, states would presumably implement procedures to honor those rights in the first place, thereby eliminating most future Vienna Convention habeas claims. State courts faced with Vienna Convention claims also would be less likely to treat those claims as procedurally barred. This would further reduce the need for federal courts to evaluate the claims in the first instance, without the benefit of state court consideration. *Cf. Wainwright v. Sykes*, 433 U.S. 72, 89-90 (1977) (explaining that if state appellate courts know that federal issues "raised for the first time in the proceeding before them may well be decided in any event by a federal habeas tribunal[,]" they will have to choose "between addressing the issue notwithstanding the petitioner's failure to timely object, [and] fac[ing] the prospect that the federal habeas court will decide the question without the benefit of their views.") Thus, any impact on federal courts' workload created by giving effect to the *Avena* decision would diminish rapidly over time.

II. The reasoning in *Breard v. Greene* does not control the instant case in light of the subsequent authoritative interpretation of the Vienna Convention by the ICJ.

This Court's per curiam opinion in *Breard v. Greene*, 523 U.S. 371 (1998), does not control this case and is readily reconciled with Amicus' views. In *Breard*, Court gave two reasons why Petitioner Breard's Vienna Convention claim could be procedurally defaulted, neither of which applies here. First, the Court expressed the view that, at that time, the procedural default doctrine did not appear to be inconsistent with the Vienna Convention. *Id.* The Court explained that it would have "give[n] respectful consideration to the interpretation of an international treaty rendered by an international court with jurisdiction to interpret such" if there were such an interpretation. *Id.* But "absent a clear and express statement to the contrary, the procedural rules of the forum State govern the implementation of the treaty in that State." *Id.* The ICJ has now provided precisely such "a clear and express statement to the contrary." *See Avena*, ¶ 113. This subsequent authoritative interpretation of the Convention by the ICJ eliminates the primary rationale upon which the *Breard* decision was based.

Second, this Court observed in *Breard* that the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") was enacted long after the Vienna Convention became effective in the United States. This Court noted that if a statute enacted after a treaty is inconsistent with the treaty, "the statute to the extent of conflict renders the treaty null." *Breard*, 523 U.S. at 376 (internal quotation marks omitted). This Court then pointed to the provision of AEDPA providing that an evidentiary hearing is generally unavailable on federal habeas if the petitioner "has failed to develop the factual basis of [the] claim in State court proceedings." *Id.* (quoting 28 U.S.C. § 2254(e)(2)). Unlike the petitioner in *Breard*, however, Mr. Medellin raised his Vienna Convention claim in his state post-conviction proceedings. He also filed a supporting affidavit and requested an evidentiary hearing, which was denied.[13] *See* Petition for Writ of Certiorari at 21, *Medellin v. Dretke* (No. 04-5928). Thus, under *Michael Williams v. Taylor*, 529 U.S. 420 (2000), AEDPA's limitations on evidentiary hearings do not apply in this case.

In *Michael Williams*, this Court held that only habeas petitioners who have "failed to develop the factual basis of a claim," must comply with 28 U.S.C. § 2254(e)(2)'s requirements for an evidentiary hearing. 529 U.S. at 430. The Court further held that such a failure requires "a lack of diligence." *Id.* This Court emphasized that diligence "depends upon whether the prisoner made a reasonable attempt . . . [to] pursue claims in state court," *id.* at 435, and suggested that "seek[ing] an evidentiary hearing in state court in the manner prescribed by state law" would be sufficient "in the usual case." *Id.* at 437.[14] Because AEDPA's limitations on evidentiary hearings do not apply in this case, they cannot bar application of the Vienna Convention.

The fact that the ICJ has now issued the *Avena* Judgment also changes the policy considerations that necessarily bear on the question of whether some Vienna Convention claims should be exempt from the procedural default doctrine. The procedural default doctrine consists of judge-made rules designed to achieve certain goals, the foremost of which is the balancing of federal and state interests. The foreign relations stakes, and thus the federal interest in the relationship between the Vienna Convention and the procedural default doctrine, are dramatically higher now that the ICJ has issued the *Avena* Judgment than they were at the time *Breard* was considered. Ruling against Mr. Medellin would now require the Court to deny the enforceability of an ICJ order in favor of the very same individual. It would also require the Court to reject the ICJ's authoritative interpretation of the Vienna Convention, by which the United States government agreed to be bound. The implications of such a decision both for domestic separation of powers and for international relations are entirely different now than they were at the time *Breard* was before the Court.

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[13] The State concedes that Mr. Medellin was not notified of his right to contact the Mexican consul. *Medellin v. Dretke*, 371 F.3d 270, 279 (5th Cir. 2004). Indeed, the state habeas court commented on the merits of Mr. Medellin's Vienna Convention claim. *See* Brief in Opposition at 14, *Medellin v. Dretke* (No. 04-5928).

[14] *See also Mason v. Mitchell*, 320 F.3d 604, 621 n.6 (6th Cir. 2003) (finding that the petitioner's request for an evidentiary hearing in state court was sufficient to demonstrate diligence for purposes of avoiding application of 28 U.S.C. § 2254(e)(2)).

III. To promote the international rule of law and to preserve the United States' ability to protect its citizens overseas, the United States courts should give effect to the *LaGrand* and *Avena* Judgments.

The treatment of foreign nationals by domestic law enforcement may have critical international and foreign policy implications. "Experience has shown that international controversies of the gravest moment, sometimes even leading to war, may arise from real or imagined wrongs to another's subjects inflicted, or permitted, by a government." *Hines v. Davidowitz*, 312 U.S. 52, 64 (1941). It is to prevent such real or imagined wrongs from leading to international conflict that the United States has entered treaties and agreed to participate in peaceful international dispute resolution mechanisms such as the ICJ. It would dangerously undermine these actions and the international rule of law for the United States to violate its obligations under the Vienna Convention and Optional Protocol by failing to give effect to the *LaGrand* and *Avena* Judgments.

A. If the United States does not respect foreign nationals' Vienna Convention rights, United States citizens abroad will likely not receive the Convention's protections.

As this Court has observed: "One of the most important and delicate of all international relationships, recognized immemorially as a responsibility of government, has to do with the protection of the just rights of a country's own nationals when those nationals are in another country." *Hines*, 312 U.S. at 64. The Vienna Convention is designed to enable countries to help their own nationals when those nationals are abroad, in part by agreeing to allow other countries to take similar steps where their citizens are concerned. If the United States ignores its obligations under the Vienna Convention, it risks losing its ability to insist that other countries abide by their obligations to respect the consular rights of American citizens on their soil.

The United States has consistently used the Vienna Convention and the ICJ to protect its own citizens overseas. In fact, the United States was the first country to invoke the Optional Protocol, which it used to bring an application against Iran concerning U.S. diplomatic and consular personnel who were held hostage in 1979. *United States Diplomatic and Consular Staff in Teheran* (U.S. v. Iran), 1979 I.C.J. 7 (Dec. 15), 1980 I.C.J. 3 (May 24). In bringing that application, the United States relied on the Optional Protocol's establishment of the ICJ's compulsory jurisdiction over disputes arising out of the interpretation or application of the Vienna Convention. When the ICJ ruled in favor of the United States provisionally in 1979 and then finally in 1980, 1979 I.C.J. 7, 1980 I.C.J. 3, the United States insisted that Iran was bound to comply with the court's judgment.

The United States also routinely demands that it receive notice when its citizens are detained by foreign authorities. The State Department in fact requires consular officials to lodge a protest if detaining authorities do not notify the consul within 72 hours. 7 Foreign Affairs Manual § 426.2-1 (2004), available at http://foia.state.gov/masterdocs/07fam/07m0420.pdf. The United States cannot expect other countries to respect its citizens' consular rights, however, if the United States does not honor the reciprocal rights of those countries and their citizens in the face of state procedural impediments.

The fact that American courts' handling of Vienna Convention claims could affect the United States' ability to protect its citizens overseas is yet another factor distinguishing Vienna Convention rights from other rights subject to procedural default rules. If an American defendant is held to have procedurally defaulted a claim that his Sixth Amendment right to counsel was denied, only that defendant is affected. But if the United States violates foreign nationals' consular notification rights, and American courts compound that violation by refusing to hear the foreign national defendants' Vienna Convention claims, it could seriously prejudice how American citizens are treated when they are arrested overseas. This would be particularly true if the courts did so after the ICJ issued a binding decision to the contrary.

B. If United States courts now denied that they were bound by the ICJ's *Avena* Judgment, it would frustrate the United States' adoption of the Vienna Convention and Optional Protocol.

If United States courts were now to refuse to give effect to the ICJ's *Avena* decision, it would make the President's signing and the Senate's ratification of the Optional Protocol hollow. Article I of the Optional Protocol states that "[d]isputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice." Optional Protocol, art. I. Under the plain and unambiguous language of the Article, countries signing the Optional Protocol agree to submit to the jurisdiction of the ICJ in cases involving disputes over the interpretation or application of the Convention. Submitting to the ICJ's jurisdiction necessarily entails agreeing to be bound by its judgments. *See* United Nations Charter, art. 94 ("Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party"). A decision by this Court refusing to give effect to the ICJ's *Avena* Judgment would entirely undermine the President's and Senate's actions signing and ratifying the Optional Protocol. It would infringe upon the treaty powers granted to the President and the Senate by the Constitution, and it would make the United States' treaty promises unreliable in the eyes of the rest of the world.

CONCLUSION

For the reasons set forth above, and consistent with its commitment to promoting the rule of law, the ABA respectively submits that the Court should reverse the decision of the Fifth Circuit.

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Supreme Court of the United States

JOSE ERNESTO MEDELLIN,
Petitioner,
v.
DOUG DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,
Respondent.

ON WRIT OF *CERTIORARI* TO
THE FIFTH CIRCUIT COURT OF APPEALS

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U.S. Department of State, *Consular Notification and Access* 44 (2005) 17

U.S. Department of State, 7 *Foreign Affairs Manual* 15, 24-25

William Howard Taft IV, U.S. Department of State, Legal Adviser, Remarks to the National Association of Attorneys General (March 20, 2003) 15, 16

INTEREST OF *AMICI CURIAE*

This Brief of *Amici Curiae* is respectfully submitted in support of Petitioner by several bar associations as well as several human rights and civil rights organizations.[1] *Amici* include Amnesty International, Association of the Bar of the City of New York, Bar Human Rights Committee of England & Wales, Center for Justice & Accountability, Global Rights, Hispanic National Bar Association, Human Rights First, Human Rights Watch, International League of Human Rights, Jacob Blaustein Institute for the Advancement of Human Rights, League of United Latin American Citizens, Mexican American Legal Defense & Educational Fund, Minnesota Advocates for Human Rights, National Association of Criminal Defense Lawyers, Robert F. Kennedy Memorial Center for Human Rights, and The Washington Office on Latin America.

Each of these bar associations and human rights groups recognize the importance of U.S. compliance with international law. *Amici* have observed firsthand the negative consequences that arise when federal, state, or local governments fail to comply with international law. Regrettably, such issues arise on an almost daily basis. While the United States has ratified the Vienna Convention on Consular Relations, *opened for signature* Apr. 24, 1963, 21 U.S.T 77, 596 U.N.T.S. 261 ("Vienna Convention"), state and local governments have failed to comply fully with its obligations. Noncompliance is compounded by the refusal of federal courts to provide meaningful review and reconsideration for Vienna Convention violations. Without appropriate guidance from this Court, the lower courts will continue to disregard international law and U.S. treaty obligations as the Fifth Circuit Court of Appeals has done in this case.

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[1] *Amici Curiae* certify that this brief is filed with written consent of all parties, said consents having been lodged with the Court. Sup. Ct. R. 37.2(a). They also certify that no counsel for either party authored the brief in whole or in part and that no person or entity, other than *amici curiae*, their members, and their counsel, made any monetary contribution to the preparation or submission of this brief. Sup. Ct. R. 37.6.

Amnesty International USA is the U.S. section of Amnesty International, a Nobel Prize-winning organization with more than 1.8 million members, supporters and subscribers in over 150 countries and territories throughout the world. Amnesty International's mission is to undertake research and action focused on preventing and ending grave abuses of the rights to physical and mental integrity, freedom of conscience and expression, and freedom from discrimination, within the context of its work to promote all human rights. Amnesty International is privately funded and is independent of any political ideology or economic interest. In line with the organization's international focus, Amnesty International USA joins this brief on matters of international law.

The Association of the Bar of the City of New York (the Association) is a professional association of more than 22,000 attorneys from nearly every state and more than 50 countries. Much of the Association's work is accomplished through approximately 170 committees. One of these is dedicated to issues related to capital punishment. This attention to the death penalty reflects the fact that the justice system can do nothing more consequential than to take a life. The Association is committed to the rule of law on the national and international landscape and to the principle that if the death penalty is applied, it must be applied in a fair and impartial manner. Thus, the Association has long been concerned with capital punishment and its application. The Association has taken the lead in the analysis of practical and legal issues relating to the death penalty. *See, e.g.*, Committee on Capital Punishment Panel Presentation, *Capital Punishment in the Age of Terrorism*, 41 Cath. Law. 187 (2003); Committee on Capital Punishment, *Dying Twice: Conditions On New York's Death Row*, 22 Pace L. Rev. 347 (Spring 2002) (also at 56 Record Assoc. Bar N.Y. 358); Committee on Capital Punishment, *The Pataki Administration's Proposals to Expand the Death Penalty*, 55 Record Assoc. Bar N.Y. 129 (2000); Committee on Civil Rights, *Legislative Modification of Habeas Corpus in Capital Cases*, 44 Record Assoc. Bar N.Y. 848 (1989); Committee on Civil Rights, *The Death Penalty*, 39 Record Assoc. Bar N.Y. 419 (1984).

The Bar Human Rights Committee of England & Wales (BHRC) is an independent group of specialist advocates and experts who work on a voluntary basis to develop law and human rights protection throughout the world. BHRC objectives are: supporting and protection of practicing lawyers and judges who are threatened or oppressed in their work; upholding the rule of law and internationally recognized human rights standards; furthering interest in and knowledge of human rights and the laws relating to human rights; advising, supporting and co-operating with other organizations and individuals working for human rights; and advising the Bar Council in connection with any human rights issue. BHRC advises on death penalty cases and provides *amicus* briefs in cases involving the death penalty in the United States.

The Center for Justice & Accountability (CJA) is a non-profit legal advocacy center that works to prevent torture and other severe human rights abuses around the world by helping survivors hold their perpetrators accountable. CJA represents survivors and their families in actions for redress that call for the application of human rights standards under United States and customary international law.

Global Rights is a non-profit public interest legal organization with projects in twenty-two countries that is engaged in training, technical assistance, advocacy, and litigation around the world. Founded in 1978 as the International Human Rights Law Group, Global Rights provides legal assistance and information in the field of international human rights law and maintains consultative status with the Economic and Social Council of the United Nations. Global Rights' goals include the development and promotion of international legal norms, and its advocates work closely with individuals and organizations worldwide to expand the scope of human rights protections for men and women. Global Rights has represented individuals and organizations before national and international tribunals and has appeared as *amicus curiae* in numerous cases in the United States. *See, e.g., Rumsfeld v. Padilla*, 124 S. Ct. 2711 (2004); *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003).

The Hispanic National Bar Association (HNBA) is a national non-profit association representing the interests of Hispanic American members of the legal community in the United States and Puerto Rico. Founded in 1972, HNBA now represents thousands of Hispanic Americans in the legal profession. Its primary objectives are to increase professional opportunities for Hispanics in the legal profession and to address issues of concern to the national Hispanic community. The HNBA is a member of the National Hispanic Leadership Agenda and also holds a seat in the American Bar Association House of Delegates. Proper application of Article 36 of the Vienna Convention is of particular interest to the HNBA, given its largely bilingual membership and its commitment to the rule of law. Its signatory representative was a participant in the Vienna Convention Discussion Group, which led to the decision of the Oregon Department of Justice to adopt new policies to improve compliance with the Convention, as noted in the letter of April 25, 2002 from the Deputy Attorney General to William Howard Taft IV, Legal Advisor in the United States Department of State.

Human Rights First (formerly the Lawyers Committee for Human Rights) works in the United States and abroad to create a more secure and humane world by advancing justice, human dignity, and respect for the rule of law. It protects refugees in flight from persecution and repression and in seeking legal relief in the United States; works to ensure that domestic legal systems incorporate stronger human rights protections; helps build a stronger international system of justice and accountability for the worst human rights crimes; works with and supports human rights activists who fight for basic freedoms and peaceful change at the national level; and promotes fair economic practices through stronger safeguards for workers' rights. Human Rights First has filed numerous *amicus* briefs before the U.S. Supreme Court and other U.S. courts and international bodies, and believes this case presents compelling issues of justice for victims of human rights violations.

Human Rights Watch (HRW) is a non-profit organization established in 1978 that investigates and reports on violations of fundamental human rights in over 70 countries worldwide with the goal of securing the respect of these rights for all persons. It is the largest international human rights organization based in the United States. By exposing and calling attention to human rights abuses committed by state and non-state actors, HRW seeks to bring international public opinion to bear upon offending governments and others and thus bring pressure on them to end abusive practices. HRW has filed *amicus* briefs before various bodies, including U.S. courts and international tribunals.

The International League for Human Rights has worked to keep human rights at the forefront of international affairs and to give meaning and effect to the human rights values enshrined in international human rights treaties and conventions. The League's special mission for 62 years has been defending individual human rights advocates who have risked their lives to promote the ideals of a just and civil society in their homelands. Based in New York, with representation in Geneva and dozens of affiliates and partners around the world, the League is a non-governmental, non-profit organization now in its 62nd year. The League has special consultative status at the United Nations, the Council of Europe, and the International Labor Organization, and also contributes to the Africa Commission and the Organization for Security and Cooperation in Europe (OSCE). With the U.N. Universal Declaration of Human Rights as its platform, the League raises human rights issues and cases before the U.N. and other intergovernmental regional organizations in partnership with colleagues abroad, helping to amplify their voices and coordinate strategies for effective human rights protection.

The Jacob Blaustein Institute for the Advancement of Human Rights (JBI), founded in 1971, aims to promote the effective implementation of treaties and conventions to protect and promote human rights. JBI engages in fact gathering, analysis, education, and advocacy with a view to narrowing the gap between the promise of the Universal Declaration of Human Rights and other international human rights agreements and the realization of those rights in practice. JBI has joined a number of *amicus* briefs related to the promotion of justice for victims of human rights abuses, and this case presents important issues relevant to the fulfillment of legal obligations under international law.

The League of United Latin American Citizens (LULAC) is the largest and oldest Hispanic civil rights organization in the United States. With over 115,000 members in virtually every state of the nation, LULAC advances the economic condition, educational attainment, political influence, health and civil rights of Hispanic Americans. For more than 75 years, LULAC's members have sought to ensure the civil rights of Hispanics throughout the United States, and foster respect for the rule of law. We believe in the democratic principle of individual freedom and are obligated to promote, protect and assure the constitutional and statutory rights of all Hispanics, regardless of immigration status.

The Mexican American Legal Defense & Educational Fund (MALDEF) is a national civil rights organization established in 1968. Its principal objective is to secure, through litigation, advocacy, and education, the civil rights of Latinos living in the United States. MALDEF has litigated numerous cases in the area of immigrants' rights since the organization's founding. Preserving the constitutional due process rights of immigrants is a primary goal of MALDEF's Immigrants' Rights program.

Minnesota Advocates for Human Rights (Minnesota Advocates) is a volunteer-based non-profit organization committed to the impartial promotion and protection of international human rights standards and the rule of law. Minnesota Advocates conducts a broad range of innovative programs to promote human rights in the United States and around the world, including human rights monitoring and fact finding, direct legal representation, education and training, and publications. Minnesota Advocates has produced more than 50 reports documenting human rights practices in more than 25 countries; educated more than 10,000 students and community members on human rights issues; and provided legal representation to thousands of low-income individuals. Minnesota Advocates' Death Penalty Project was organized in 1991 to recruit Minnesota attorneys to assist death row inmates with their post-conviction appeals. Minnesota Advocates' volunteers have provided *pro bono* representation to dozens of death row inmates in 10 states. In addition to working to protect the rights of capital defendants in death penalty states, the project provides education on death penalty issues and actively advocates for the elimination of the death penalty in the United States. Minnesota Advocates has previously submitted *amicus curiae* briefs in numerous cases, including to the Inter-American Court of Human Rights concerning the request of the government of Mexico for an advisory opinion related to a Mexican national on death row in the United States.

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit corporation with more than 11,400 members nationwide and 28,000 affiliate members in 50 states, including private criminal defense attorneys, public defenders, and law professors. The American Bar Association recognizes the NACDL as an affiliate organization and awards it full representation in the ABA's House of Delegates. NACDL was founded in 1958 to promote criminal-law research, to advance and disseminate knowledge in the area of criminal practice, and to encourage integrity, independence, and expertise among criminal-defense counsel. NACDL is particularly dedicated to advancing the proper, efficient, and just administration of justice, including issues involving the death penalty. In furtherance of this and other objectives, the NACDL files approximately 35 *amicus curiae* briefs each year, in this Court and others, addressing a wide variety of criminal-justice issues.

The Robert F. Kennedy Memorial Center for Human Rights (CHR) is a non-profit organization working to advance Robert F. Kennedy's vision of social justice by promoting the full spectrum of human rights throughout the world. The annual RFK Human Rights Award honors individuals who, at great risk, stand up to government oppression in the nonviolent pursuit of respect for human rights. The CHR develops and carries out projects, which enhance and complement the social change agendas of the laureates. Our work includes advocacy and legal projects with the U.S. and foreign governments, international agencies and other human rights organizations. The CHR has promoted the respect and implementation of the legal norms related to human rights at a domestic and international level, including cases before the International Labor Organization, the Inter-American Commission on Human Rights, and the World Bank Inspection Panel, encouraging both the U.S. and foreign governments to respect the human rights of their citizens and foreign nationals within their respective territories. These efforts will have little substance so long as the United States continues to ignore international law regarding the rights of foreign nationals in its territory.

The Washington Office on Latin America (WOLA) is a non-profit policy, research, and advocacy organization working to advance democracy, human rights, and social justice in Latin America and the Caribbean. Founded in 1974, WOLA plays a leading role in Washington policy debates about Latin America. WOLA facilitates dialogue between governmental and non-governmental actors, monitors the impact of policies and programs of governments and international organizations, and promotes alternatives through reporting, education, training, and advocacy. Additionally, WOLA has worked to develop greater respect for international legal norms and has appeared before various tribunals, including the Inter-American Commission on Human Rights, to encourage Latin American governments to respect the human rights of their citizens and foreign nationals within their respective territories. These efforts will no doubt be undermined so long as the United States government fails to respect international law regarding the rights of foreign nationals in its territory.

While *Amici Curiae* pursue and protect a wide variety of legal interests, they all share a deep commitment to the rule of law. Thus, the participation of *Amici* will assist this Court in understanding the profound negative implications and practical consequences of U.S. failure to comply with the Vienna Convention and the rulings of the International Court of Justice.

SUMMARY OF ARGUMENT

Long before Petitioner's case arose, the political branches of the United States government made the policy choice entrusted to them by the United States Constitution to ensure reciprocal protection for U.S. citizens abroad by negotiating and ratifying the Vienna Convention. The political branches also negotiated and ratified the related Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, *opened for signature* Apr. 24, 1963, 21 U.S.T. 325, 596 U.N.T.S. 261 ("Optional Protocol"). Significantly, the Optional Protocol vests the International Court of Justice ("ICJ") with jurisdiction to resolve disputes over the interpretation and application of the Vienna Convention.

In *Avena*, the ICJ definitively interpreted the Vienna Convention as mandating specific *procedural* relief in the

case of Petitioner Jose Ernesto Medellin ("Petitioner" or "Mr. Medellin") and fifty other Mexican death row inmates in U.S. prisons who were not informed of their right to seek consular assistance. *See Case Concerning Avena and Other Mexican Nationals* (Mex. v. U.S.), 2004 I.C.J. (Judgment of March 31, 2004) ("*Avena*").[2] The ICJ clearly and unequivocally declared that the United States is legally obligated to provide the *procedural* remedy of review and reconsideration in response to Vienna Convention violations. Indeed, it specifically referred to the Petitioner's case, as well as the cases of fifty other Mexican nationals on death row in this country.

In *Medellin v. Dretke*, 371 F.3d 270 (5th Cir. 2004), the Fifth Circuit disregarded the Vienna Convention and the ICJ's ruling in *Avena*. It denied Mr. Medellin's application for post-conviction relief on the grounds that any violation was procedurally defaulted and that the Vienna Convention did not create individually enforceable rights. The Fifth Circuit's rulings, and similar decisions of many other state and federal courts, are in direct conflict with the ICJ's ruling in *Avena* and the international obligations of the United States under the Vienna Convention. These rulings undermine the rule of law, long a central feature of U.S. foreign policy. They also threaten the ability of consular officials to effectively protect the interests of their nationals. Because the protections afforded by the Vienna Convention are reciprocal in nature, noncompliance in the United States will inevitably be replicated abroad, harming the interests of U.S. citizens that travel and work around the world.

For these reasons, this Court should reverse the judgment of the Fifth Circuit and remand this action for review and reconsideration of the violation of Mr. Medellin's Vienna Convention rights in a manner consistent with *Avena*.

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[2] The opinions of the International Court of Justice are available at www.icj-cij.org.

ARGUMENT

I. UNITED STATES COURTS MUST ADHERE TO THE RULE OF LAW AND APPLY THE RULES OF DECISION ISSUED BY THE INTERNATIONAL COURT OF JUSTICE IN *AVENA*

A. The United States Has a Long History of Promoting Respect for the Rule of Law.

Throughout its history, the United States has consistently asserted that violations of international law have serious consequences for international order. No less a realist than Secretary of State Henry A. Kissinger has noted that "[t]he United States is convinced in its own interest that the extension of legal order is a boon to humanity and a necessity." Henry A. Kissinger, *International Law, World Order, and Human Progress*, 73 Dep't St. Bull., 353, 354 (Sept. 8, 1975). *See also* Charles N. Brower, Acting Department of State Legal Adviser, *International Law as an Instrument of National Policy*, 68 Dep't St. Bull., 644, 644 (May 21, 1973) ("States comply with [international] law . . . because it is politic to do so."); John Foster Dulles, Testimony Before Congress Regarding the Ratification of the U.N. Charter, *quoted in* Ambassador Madeleine K. Albright, *Enforcing International Law*, Speech Before the Philadelphia Bar Association at 9 (June 15, 1995), *at* http://dosfan.lib.uic.edu/ERC/law/press_statements/950615.html ("As a nation, we have, more than any other, striven for the supremacy of law as an expression of justice. Now, we are seeking to establish world order based on the assumption that the collective life of nations ought to be governed by law -- law as formulated in the Charter of the U.N. and other international treaties, and law as enunciated by international courts.").

The United States has promoted respect for international law because it reflects important American values; "[i]t is a repository of our experience and our idealism." Kissinger, *supra*, at 354. Accordingly, U.S. administrations have repeatedly reaffirmed the commitment of the United States to honoring its international law obligations. *See, e.g.*, Madeleine K. Albright, *U.S. Efforts to Promote the Rule of Law*, Remarks at the Condon-Falkner Distinguished Lecture, University of Washington School of Law, *in* U.S. Dep't of St. Dispatch, Nov. 1998, at 6 ("Law is a theme that ties together the broad goals of our foreign policy."); Letter from President Ford to Seymour J. Rubin, *reprinted in* States-International Status, Attributes, and Types: Rights and Duties of States: Nonintervention in Internal Affairs 1975 *Digest* § 1, at 16 ("It is my intention that the Government of the United States shall observe international law and endeavor to promote its strengthening in all areas to which it applies."); Kissinger, *supra*, at 362 ("[D]edication to international law has always been a central feature of our foreign policy.").

In recent years, the Bush administration has reaffirmed the important role that the rule of law plays in U.S. foreign policy. As noted by the U.S. Deputy Permanent Representative to the United Nations in remarks to the U.N. Security Council:

> [E]stablishing and maintaining the rule of law has been an enduring theme of American foreign policy for over two

> centuries. Notably, the U.S. Constitution specifically provides that treaties shall be the supreme law of the land. We therefore do not enter into treaties lightly because we believe the importance of the rule of law to a successful system of peace cannot be overstated.

Ambassador James B. Cunningham, United States Deputy Permanent Representative to the United Nations, Statement on Justice and the Rule of Law to the U.N. Security Council at 1 (Sept. 24, 2003), *at* http://www.un.int/usa/03_147.htm. Thus, promotion of the rule of law is a defining value of U.S. foreign policy and a key strategy for promoting peace and stability throughout the world.

> As a nation founded by law, the United States is the unflagging champion of the rule of law. By working together in support of the rule of law, we believe the international community can strengthen the peace and help conflict-ridden societies build a better future. For two hundred years, this has been our firm conviction and practice, and it will remain our first article of faith.

Id. at 2. *See also* Marc Grossman, Under Secretary for Political Affairs, U.S. Department of State, Remarks to the Center for Strategic and International Studies at 1 (May 6, 2002), *at* http://www.state.gov/p/9949.htm ("Let me get right to the point. . . . Here's what America believes in: We believe in justice and promotion of the rule of law.").

It is expected, therefore, that the United States will be a leader in complying with the obligations of the Vienna Convention and the Optional Protocol. In so doing, we demonstrate to "the world that the United States does indeed take its international law responsibilities seriously." William Howard Taft IV, U.S. Department of State, Legal Adviser, Remarks to the National Association of Attorneys General at 5 (March 20, 2003), *at* http://usinfo.state.gov.

It is also in our interest to do so. The Vienna Convention protects U.S. citizens abroad – from tourists to business travelers. All U.S. Foreign Service posts are instructed to ensure that the protections of the Vienna Convention are provided to U.S. citizens abroad. *See* U.S. Dep't of St., 7 *Foreign Affairs Manual*. And as our own consular officials are informed, "[f]ew of our citizens need that assistance more than those who have been arrested in a foreign country or imprisoned in a foreign jail." *Id.* at § 412 (Sept. 1, 2004). But these protections will only be provided if we comply with our international obligations and provide foreign nationals with comparable protections in the United States.[3] As noted by the U.S. Legal Adviser:

> These obligations were all entered into as part of a very aggressive effort of the United States Government to protect American

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[3] Significantly, the *Foreign Affairs Manual* recognizes the reciprocal nature of Vienna Convention obligations and the implications of non-compliance in the United States. It acknowledges that foreign governments may not comply with Vienna Convention obligations because "U.S. authorities do not always promptly notify that country's consular representatives of the arrest of one of their nationals." *Id.* at 421.2-3 (Sept. 3, 2004). In response, U.S. consular officials are instructed to point out that "[e]ven where this might be true, it does not exempt the host government from its treaty obligations. Two wrongs do not make a right. We should all work toward improved compliance with consular notification obligations." *Id.* at 421.2-3(a).

> citizens abroad. To get protection for Americans abroad in our treaties, it was necessary to provide reciprocal protections to foreign nationals in the United States. We obviously can't insist that other countries comply and then not comply ourselves. So it is both right and fair that we comply.

Taft, *supra*, at 15.

In sum, the interests of all persons – from foreign nationals in the United States to Americans abroad – are best served by adherence to the rule of law as embodied in the Vienna Convention. Failure to adhere to the rule of law would compromise this most American value and would undermine the work that *Amici* do.

B. The United States Is Legally Bound By the Vienna Convention and the Optional Protocol to Grant the Relief Mandated in *Avena*.

Over thirty years ago, the United States, through the power granted to its Executive and Legislative branches of government by the United States Constitution, made the policy choice to sign and ratify the Vienna Convention, making it and its attendant provisions the supreme law of the land. *See* U.S. Const. art. II, § 2, cl. 2 & art. VI, cl. 2.

On April 24, 1963, the United States signed the Vienna Convention. The Senate subsequently approved the Vienna Convention on October 22, 1969, and it was formally ratified on November 12, 1969. The instrument of ratification was deposited on November 24, 1969, and it entered into force for the United States on December 24,

1969.[4] As the U.S. State Department has indicated, the Vienna Convention creates obligations that are binding on federal, state, and local governments. *See* U.S. Dep't of St., *Consular Notification and Access* 44 (2005), *available at* http://travel.state.gov/pdf/CNA_book.pdf.[5]

The Vienna Convention provides that foreign nationals must be informed of their right to communicate with consular officials when they are arrested or detained in any manner. Vienna Convention, art. 36, para. 1. The Convention also requires that competent authorities notify the appropriate consulate if the foreign national so requests. *Id.* Finally, it entitles consular officials to visit their nationals, to communicate with them, and to arrange for their legal representation. *Id.* Thus, the Vienna Convention serves two broad goals. Through consular assistance, foreign nationals can gain a greater awareness of the nature and scope of the legal proceedings that affect them. At the same time, consular assistance allows foreign governments to monitor the safety and fair treatment of their nationals in such proceedings.

Significantly, the United States has also signed and ratified the Optional Protocol to the Vienna Convention. By doing so, it recognized the ICJ's authoritative jurisdiction over questions regarding "interpretation or application of the Convention." Optional Protocol, Preamble; art. I. Moreover, under Article 94 of the United Nations Charter, the United States also has agreed to comply with ICJ decisions in cases to which it is a party. U.N. Charter art. 94, para. 1 ("Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party.").

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[4] As of January 1, 2005, there are 166 States Parties to the Vienna Convention.

[5] Indeed, "[i]mplementing legislation is not necessary . . . because executive, law enforcement, and judicial authorities can implement these obligations through their existing powers." Consular Notification and Access, supra, at 44. Upon submitting the Vienna Convention to the Senate, the Executive branch indicated that the treaty was "entirely self-executive [sic] and does not require any implementing or complementary legislation." S. Exec. Rep. No. 91-9, 91st Cong., 1st Sess. at 2 & 5 (1969) (appendix) (statement by J. Edward Lyerly, Deputy Legal Adviser).

In March 2004, the ICJ considered the application of the Vienna Convention in an action filed by Mexico against the United States. In *Avena*, the ICJ affirmed that the Vienna Convention creates individual rights. It then held that the United States violated the Vienna Convention in Mr. Medellin's case as well as in the cases of fifty other Mexican nationals. *See Avena*, para. 153. To remedy these violations, the ICJ ruled that the United States must provide "by means of its own choosing, review and reconsideration of the convictions and sentences of the Mexican nationals" and take into account the rights set forth in Article 36 as well as relevant portions of the *Avena* judgment. *Id.*, para. 153(9). The ICJ specified that review and reconsideration must be effective and provide "a procedure which guarantees that full weight is given to the violation of the rights set forth in the Vienna Convention, whatever may be the actual outcome of such review and reconsideration." *Id.*, para. 139. The ICJ also reaffirmed that the procedural default rule cannot be used to preclude a defendant from raising a Vienna Convention violation. *Id.*, para. 134. Application of procedural default rules would effectively nullify the right to review and reconsideration as mandated by the ICJ.

The ICJ stated, moreover, that "the judicial process" of the United States is best suited to undertake review and reconsideration. *Id.*, para. 140. The ICJ emphasized that the executive clemency process is "not sufficient in itself to serve as an appropriate means of 'review and reconsideration.'" *Id.*, para. 143. It is, therefore, the responsibility of the courts to ensure meaningful review and reconsideration. Finally, the ICJ stated that its conclusions not only applied to the cases of the Mexican nationals before it but also to the cases of other foreign nationals subject to similar situations in the United States. *Id.*, para. 151.

Under national and international law, the implications of the *Avena* ruling are clear. The United States has a binding legal obligation to comply with the Vienna Convention as well as the decisions of the ICJ concerning the interpretation and application of the Vienna Convention. But this has not occurred.

II. *AVENA* REQUIRES THE *PROCEDURAL* REMEDY OF MEANINGFUL JUDICIAL REVIEW AND RECONSIDERATION TO DETERMINE WHETHER THE VIENNA CONVENTION VIOLATION CAUSED ACTUAL PREJUDICE WARRANTING AN APPROPRIATE *SUBSTANTIVE* REMEDY.

As set forth in Part I, U.S. courts must and should abide by the decision of the ICJ in *Avena*, which adjudicated Petitioner's case in accordance with the Vienna Convention and Optional Protocol. Yet, the Fifth Circuit denied Petitioner's request for a certificate of appealability notwithstanding the *Avena* judgment. In so doing, the court denied Mr. Medellin the *procedural* remedy of review and reconsideration mandated by *Avena*. *Compare Torres v. Oklahoma*, No. PCD-04-442, at 2 (Okla. Crim. App. May 13, 2004) (remanding for an evidentiary hearing on "whether Torres was prejudiced by the State's violation of his Vienna Convention rights") (attached at Petitioner's Appendix 142a-163a). As a consequence, the court also precluded Mr. Medellin from any opportunity of obtaining a *substantive* remedy (*e.g.*, vacating his death sentence and ordering a new sentencing hearing) for an undisputed violation of his Vienna Convention rights. This was error.

Petitioner's Brief to this Court demonstrates that the Fifth Circuit's rulings on the procedural default rule and the purported lack of individually enforceable rights in this case were erroneous. The Fifth Circuit's rulings directly contradict *Avena* with respect to *procedural* remedies for violations of the Vienna Convention. The *Avena* judgment mandates the specific *procedural* relief in Mr. Medellin's case of effective and meaningful review to evaluate whether the Vienna Convention violations affected the fairness of Mr. Medellin's criminal proceedings. This was not done.

In *Avena*, the ICJ found that there had been clear and unequivocal violations of the Vienna Convention by the United States. *Avena*, para. 153. The ICJ then observed that, "'[i]t is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form.'" *Id.*, para. 119 (quoting *Factory at Chorzów, Jurisdiction*, 1927, P.C.I.J., Series A, No. 9, p. 21). The ICJ added that "'reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed.'" *Id.* (quoting *Factory at Chorzów, Merits*, 1928, P.C.I.J., Series A, No.17, p. 47).

Next, relying on *LaGrand (F.R.G. v. U.S.)* 2001 I.C.J. 104 (Jun. 27) ("*LaGrand*"), the ICJ reiterated that the mere remedy of "'an apology would not suffice in cases where the individuals concerned have been subjected to prolonged detention or convicted and sentenced to severe penalties.'" *Avena*, para. 120 (quoting *LaGrand*, para. 125). Instead, the ICJ emphasized it is "incumbent upon the United States to allow the review and reconsideration of the conviction and sentence *by taking account of the violation of the rights set forth in the Convention*.'" *Id.* (quoting *LaGrand*, para. 125) (emphasis added). Critically, the ICJ stated that the "'choice of means'" for review and reconsideration "'must be left to the United States.'" *Id.* (quoting *LaGrand*, para. 125).

Following the above logic, the ICJ held in *Avena* that the starting point for any remedial measures for Vienna Convention violations "should consist in an obligation on the United States to permit review and reconsideration of these nationals' cases by the United States courts . . . with a view to ascertaining whether in each case the violation of

Article 36 . . . caused actual prejudice to the defendant in the process of administration of criminal justice." *Avena*, para. 121.

The ICJ was careful not to mandate precisely how U.S. courts should carry out the *procedural* remedy of meaningful review and consideration. *See Avena*, para. 120, 122, 131. It left that decision for U.S. courts. But the ICJ admonished that:

> It should be underlined, however, that this freedom in the choice of *means* for such review and reconsideration is *not without qualification*: . . . such review and reconsideration has to be carried out "by taking account of the violation of the rights set forth in the Convention" . . . including, in particular, the question of the legal consequences of the violation upon the criminal proceedings that have followed the violation.

Avena, para. 131 (emphasis added). The ICJ rejected the U.S. contention that the clemency process was adequate to undertake the required review and reconsideration, and concluded that the judiciary was best suited to the task. *See id.*, para. 122 (assessing the significance of Vienna Convention violations "is an integral part of *criminal proceedings before the courts of the United States* . . ." (emphasis added)); para. 138 ("review and reconsideration should be both of the sentence and the conviction"); para. 140 ("The Court [ICJ] considers that it is the judicial process that is suited to this task."). *Compare* para. 143 (noting "the clemency process . . . is . . . not sufficient in itself to serve as an appropriate means of 'review and reconsideration'").

Despite the unambiguous holding of *Avena* reaffirming the requirement established in *LaGrand* that U.S. courts must implement procedures to conduct review and reconsideration of undisputed Vienna Convention violations, the Fifth Circuit concluded it was not bound by *Avena*'s holding.

III. DISREGARDING *AVENA* WILL UNDERMINE THE CONSULAR ASSISTANCE GUARANTEES OFFERED BY THE VIENNA CONVENTION

The consular posts of governments throughout the world, including Mexico and the United States, follow a settled body of procedures to implement the rights afforded by the Vienna Convention for their respective nationals detained abroad. In the event a national is arrested or otherwise detained within a foreign country, Paragraph 1 of Article 36 of the Vienna Convention sets out that, "consular offices shall have the right to visit a national . . . who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation." Vienna Convention, art. 36, para. 1(c).

As Mexico emphasized in *Avena*, it is of particular importance for its consular officers to be able to arrange for legal representation before and during trial, as well as at sentencing, particularly when a severe penalty may be imposed. *Avena*, para. 104. The Mexican government has followed an established procedure to offer specific consular assistance to Mexican nationals detained in the United States. *See Torres v. Oklahoma*, No. PCD-04-442, at 10 (Okla. Crim. App. May 13, 2004) (Chapel, J., specially concurring) (attached at Petitioner's Appendix 145a-158a). Pursuant to Mexico's procedures, "[c]onsular officials monitor defense counsel's efforts, speak regularly with defense counsel, the defendant and his family, and attend court proceedings." *Id.* (Chapel, J., specially concurring). Consular officials also assist in gathering evidence and providing funds for experts, investigators, DNA testing, and jury consultants. *See id.* at 10-11 (Chapel, J., specially concurring). The Mexican government also "obtains and provides official documents from institutions in Mexico such as schools and hospitals, searches for criminal records, and assists attorneys traveling in Mexico with logistical support, translators, and witness identification and preparation." *Id.* at 11 (Chapel, J., specially concurring).

Not surprisingly, U.S. consular posts follow established procedures to provide consular assistance to Americans detained abroad. U.S. policy includes the prompt delivery of key information to detained individuals after their arrest. These materials include information regarding judicial procedures the individual is likely to experience, U.S. Dep't of St., 7 *Foreign Affairs Manual* § 415.3 (Sept. 1, 2004), and tailored lists of lawyers with details including languages spoken and specialties. *Id.*, § 415.4 (Sept. 1, 2004); § 991 (Aug. 30, 1999); § 992 (Aug. 30, 1994). Under the State Department's *Foreign Affairs Manual*, consular officers are expected "to be particularly active in, and to fully engage in, the [detained individual's] case during the often-lengthy pretrial period." *Id.*, § 432 (Aug. 26, 2004). The *Foreign Affairs Manual* also indicates that consular officers should frequently visit detained nationals to "monitor whether attorneys retained by U.S. inmates are in contact with them and rendering them appropriate and adequate counsel and other legal services" as well as to "keep prisoners updated on any developments that may relate to their cases such as information obtained from defense counsels, prosecutors, [and] judges." *Id.*, § 433.1 (Aug. 26, 2004). These practices continue into the appellate stage where U.S. policy instructs consular officers to continue providing appropriate services, including acting as a liaison to the detained individual's attorney and judicial authorities. *Id.*, § 454 (Oct. 28, 2004).

Notice of the availability of consular assistance is the beginning of a procedure developed and refined by consular posts to ensure that foreign nationals have adequate resources and knowledge to avail themselves of the rights afforded under the law. If the Vienna Convention and the ICJ's decision in *Avena* are not followed by U.S. courts, the procedures developed by foreign governments to assist and protect the rights of their citizens detained in this country are of little benefit. Those same rights for Americans abroad may also be in jeopardy.

CONCLUSION

In *The Western Maid*, 257 U.S. 419 (1922), Justice Holmes noted that "[l]egal obligations that exist but cannot be enforced are ghosts that are seen in the law but that are elusive to the grasp." *Id.* at 433. This Court must affirm and give effect to the obligations of the United States under the Vienna Convention or risk transforming the rule of law into a ghostly apparition that is seldom seen and never heard. This latter outcome does not serve the interests of the United States, the interests of its citizens, or the *Amici*, who seek to promote respect for the rule of law in their own work on a daily basis.

For the foregoing reasons, the Court should reverse the judgment of the Fifth Circuit and remand for review and reconsideration of Petitioner's Vienna Convention rights in a manner consistent with the *Avena* judgment.

Dated: January 24, 2005

Respectfully submitted,

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(22)

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In The
Supreme Court of the United States

◆

JOSÉ ERNESTO MEDELLÍN,

Petitioner,

v.

DOUG DRETKE, DIRECTOR, TEXAS
DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,

Respondent.

◆

On A Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

◆

BRIEF FOR *AMICUS CURIAE* SENATOR JOHN CORNYN IN SUPPORT OF RESPONDENT

◆

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INTEREST OF *AMICUS CURIAE*

Senator John Cornyn represents Texas in the United States Senate.[1] He is a member of the Senate Judiciary Committee, which has responsibility for Article III judicial nominations and all Title 28 legislation. A determination that the judiciary of the United States could be subject to binding mandates issued by the International Court of Justice would have significance to Senator Cornyn, as a member of the United States Senate and the Senate Judiciary Committee, and to his constituents. As a former member of the Texas Supreme Court, Senator Cornyn also has a distinct perspective of the disruption flowing from an international tribunal's oversight of state criminal justice systems.

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INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioner Medellin is a Mexican national convicted of capital murder and sentenced to death by the State of Texas. His direct appeal and state habeas corpus petition were unsuccessful. He sought a writ of habeas corpus in federal district court, arguing that his conviction and sentence violated Article 36 of the Vienna Convention on Consular Relations, which requires state prosecutors to notify a detained foreign national of his right to request consular assistance from his own country and, if he so requests, to promptly inform the consul post of that country. While petitioner's federal habeas petition was pending, the Government of Mexico initiated proceedings against the United States in the International Court of Justice ("ICJ"), invoking the Optional Protocol of the Convention, which vests in the ICJ "compulsory jurisdiction" over bilateral disputes arising out of the Convention's "interpretation or application." Mexico sought enforcement of Article 36 specifically on behalf of petitioner and 53 other Mexican nationals who had been sentenced to death in state criminal proceedings dating back to 1979. *Avena and Other Mexican Nationals* (*Mex. v. U.S.*), No. 128, 2004 I.C.J. 1 (Mar. 31, 2004) (P.A. 174a-274a).

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* represents that it authored this brief and that no person other than counsel or *amicus* made a monetary contribution to its preparation or submission. All parties have consented to the filing of this brief.

Finding that the United States had breached its obligations under Article 36, the ICJ entered a "final judgment" that, in petitioner's words, "expressly adjudicated Mr. Medellin's own rights. . . ." Brief of Petitioner ("Pet. Br.") at 10. The ICJ denied Mexico's request for "annulment" of petitioner's conviction and sentence, but ordered that the United States provide "review and reconsideration" of the conviction and sentence pursuant to a "process . . . which guarantees that full weight is given to the violation of the rights set forth in the Vienna Convention," P.A. 262a, *Avena* ¶ 136, without regard for state procedural default rules.

According to petitioner, the ICJ's final judgment in *Avena* is the last word in this case. It announces the "rule of decision in Mr. Medellin's case," Pet. Br. at 19, and "the courts of the State of Texas and other state and federal courts throughout the land" are bound to obey and to

enforce it. Pet. Br. at 13. Petitioner does not mince his words in arguing that the ICJ sits atop even *this Court* in the federal judicial hierarchy for purposes of resolving this and other "disputes concerning the 'interpretation' and 'application' of the Convention" *as supreme federal law*. Pet. Br. at 37. As petitioner puts it:

> The courts are an organ of the United States and hence are bound by its treaty commitments under both international law and the United States Constitution. . . . By operation of the treaty obligations [in the Vienna Convention] undertaken by the political branches, the courts of the United States now must "comply with the [*Avena*] decision," . . . by treating the *Avena* judgment as conclusive of Mr. Medellin's rights under the Convention. . . . It is therefore incumbent upon this Court to bring the state and federal courts of the United States into line with [the ICJ's judgment in *Avena*].

Pet. Br. at 36-37.[2]

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[2] *See, e.g.*, Pet. Br. at 23 ("The obligation of the constituent organs and political subdivisions of the United States to comply with the interpretation and application of the Vienna Convention and the *Avena* judgment therefore follows as fully from United States law as from international law."); Pet. Br. at 33 ("Here, the United States submitted to the compulsory jurisdiction of the ICJ in disputes concerning the interpretation and application of the Vienna Convention. It therefore must comply with the ICJ's interpretation and application of the Convention in *Avena*."); Pet. Br. at 35 ("It follows that the binding interpretation and application of the self-executing obligations of the Vienna Convention in the *Avena* Judgment must be given effect in the courts of the United States."); Pet. Br. at 40 ("That right is a federal right, by virtue of the status of the Vienna Convention as preemptive federal law under the Supremacy Clause and the agreement of the United States that decisions of the ICJ are binding cases concerning the interpretation and application of the Convention.").

Even the contemporary observer, accustomed to global security and trade alliances and modern international government structures, gasps at petitioner's radical argument. But consider how the Framers and the members of the state ratifying conventions would have reacted to the claim that the federal government would be empowered under the new Constitution to subject state criminal convictions to binding judicial review, and indeed *annulment*, not only by "one Supreme Court" composed of Article III judges enforcing constitutional norms, but also by a super-supreme international court composed of elected representatives of foreign countries enforcing treaty obligations.

Nothing more need be said to know that petitioner's argument, notwithstanding its impressive *amicus* support, "strain[s] the Constitution and the law to a construction never imagined or dreamed of" by those who framed and ratified it. *Hans v. Louisiana*, 134 U.S. 1, 15 (1890). The Framers carefully confined the immense power of judicial review to Article III judges whose appointment requires the dual action of the President and the Senate and whose independence is safeguarded by life tenure and protected salaries. If petitioner's understanding of the binding nature of the ICJ's "rule of decision" in *Avena* is correct, then the Optional Protocol of the Vienna Convention is, to that extent, unconstitutional.

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ARGUMENT

I. VESTING THE ICJ WITH BINDING JUDICIAL POWER WOULD VIOLATE ARTICLE III.

If "state and federal courts throughout the land," including this Court, are bound to enforce the *Avena* order, then the ICJ has exercised "judicial power" in contravention of Article III's command that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. CONST. art. III, § 1. As Justice O'Connor has observed, "Article III of our Constitution reserves to federal courts the power to decide cases and controversies, and the U.S. Congress may not delegate to another tribunal 'the essential attributes of judicial power.'" Justice Sandra Day O'Connor, *Federalism of Free Nations*, 28 N.Y.U. J. INT'L L. & POL. 35, 42-43 (Fall 1995-Winter 1996) (quoting *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 851 (1986)).

A. Foreign Tribunals Cannot Exercise Control Over This Court.

Under the judicial hierarchy established by Article III, this Court sits as the final arbiter of all questions of federal law, including questions that arise under treaties that become federal law through the combined operation of the Treaty and Supremacy Clauses. For more than two centuries, this constitutional architecture has not been questioned. But the ICJ lays claim to be the "one supreme Court" envisioned by Article III, at least with respect to questions relating to the scope of the United States' obligations under the Vienna Convention. The ICJ's effort to exercise jurisdiction over this Court cannot be squared with the plain language, the history, or the purposes behind Article III.

Article III establishes one – and only one – "supreme Court." The plain meaning of the term "supreme" is not subject to debate – it was clearly intended to establish one court as the "*last* resort of justice" with "*ultimate* appellate jurisdiction." John Jay, Draft of Letter From Justices of the Supreme Court to George Washington, 15 Sept. 1790, 2 GRIFFITH J. MCREE, LIFE AND CORRESPONDENCE OF JAMES IREDELL 293-94 (1857) (emphases in original). And all other courts exercising federal judicial power must be "inferior" to this Court. Thus, it has long since been understood that this Court "is the tribunal which is ultimately to decide all judicial questions confided to the Government of the United States." *Gordon v. United States*, 117 U.S. 697, 700 (1865). Justice Jackson's famous aphorism aptly captures this simple truth: "We are not final because we are infallible, but we are infallible only because *we are final*." *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring) (emphasis added).

One corollary of this Court's role as the ultimate arbiter of federal law is that "it is quite clear that Congress cannot subject the judgments of the Supreme Court to the re-examination and revision of any other tribunal or any other department of the government." *United States v. O'Grady*, 89 U.S. (22 Wall.) 641, 648 (1874). This tenet dates back to the Founding. In 1792 in *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792), five of the six Justices, sitting as members of circuit courts, considered the constitutionality

of a federal statute that authorized pensions for disabled veterans of the Revolution. The statute provided that the lower federal courts were to determine the appropriate disability payments, but conferred upon the Secretary of War the authority to review the decisions. Although Congress repealed the law before this Court could rule upon its constitutionality, the circuit court decisions uniformly held that the statute was unconstitutional because it threatened the independence of the federal courts by subjecting their decisions to review by non-Article III actors. As Justice Iredell explained, the statute "subject[ed] the decision of the court to a mode of revision which we consider to be unwarranted by the Constitution" because "no decision of any court of the United States can, under any circumstances, in our opinion, agreeable to the Constitution, be liable to a revision, or even suspension, by the Legislature itself, in whom no judicial power of any kind appears to be vested. . . ." *Id.* at 413. *See also id.* at 411 (opinion of Wilson and Blair, JJ., and Peters, D.J.) ("Revision and control" of Article III judgments is "radically inconsistent with the independence of that judicial power which is vested in the court."). It necessarily follows that if Congress cannot review the decisions of the Supreme Court, it cannot delegate such authority to another body, including a foreign court.

Article III, Section 2 makes clear that this Court's authority extends to federal questions that involve the interpretation and application of international law and "treaties." As St. George Tucker explained in 1803, "No one doubted the necessity and propriety of a federal judiciary, where an ultimate decision might be had upon such questions as might arise under the *law of nations*, and eventually embroil the American nation with other sovereign powers. . . ." ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES AND OF THE COMMONWEALTH OF VIRGINIA, vol. I app. at 350 (1803) ("BLACKSTONE'S COMMENTARIES") (emphasis added). In his COMMENTARIES ON THE CONSTITUTION, Justice Story explained the benefits of this system: "The Constitution has wisely established, that there shall be one Supreme Court, with a view to uniformity of decision in all cases whatsoever, belonging to the judicial department, whether they arise at the common law or in equity, or within the admiralty and prize jurisdiction; whether they respect the doctrines of mere municipal law, or constitutional law, or the *law of nations*." 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1591 (1833) (emphasis added).

In short, under the structure established by the Constitution, there is no room for a non-Article III tribunal (or even another Article III tribunal) to review the decisions of this Court, even in cases implicating treaties and the law of nations. *See Plaut v. Spendthrift Farm*, 514 U.S. 211, 218-19 (1995) ("[T]he record of history shows that the Framers crafted this charter of the judicial department with an expressed understanding that gives the Federal Judiciary the power, not merely to rule on cases, but to decide them, subject to review *only* by superior courts in the Article III hierarchy. . . .") (emphasis added).[3]

B. Allowing The ICJ To Issue Orders To This Court Would Undermine The Judiciary's Independence.

Petitioner's sweeping conception of the ICJ's authority over this Court would also undermine one of the central purposes of Article III. This Court has consistently acknowledged that Article III serves "to protect 'the role of the independent judiciary within the constitutional scheme of tripartite government.'" *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 848 (1986) (quoting *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 583 (1985)). The Framers viewed the "absolute independence of the judiciary" as "one of the fundamental principles" of our constitutional system of government. BLACKSTONE'S COMMENTARIES, vol. I app. at 354. In recognition of the importance of this principle, this Court has consistently held that the Constitution "commands that the independence of the Judiciary be jealously guarded, and it provides clear institutional protections for that

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[3] The ICJ order at issue in this case relates to Mexican nationals convicted of capital murder. As the ICJ recognized, three of these felons have completely exhausted all judicial remedies, *Avena*, ¶ 20, and thus

(Continued on following page)

these cases have been finally adjudicated. Nevertheless, the ICJ purports to order that these cases be reopened for "review and reconsideration of the conviction and sentence." *Avena*, at p. 61. But in *Plaut*, this Court emphasized that the Constitution "'gives the Federal Judiciary the power, not merely to rule on cases, but to decide them, subject to review only by superior courts in the Article III hierarchy – with an understanding, in short, that 'a judgment conclusively resolves the case' because 'a "judicial Power" is one to render dispositive judgments.'" 514 U.S. at 218-19 (quoting Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905, 926 (1990)). Accordingly, the ICJ's claimed authority to reopen cases that have been finally resolved by the courts of this country constitutes an independent violation of Article III.

independence." *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 60 (1982) (plurality opinion).

These protections take the form of a requirement that "[t]he Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." U.S. CONST. art. III, § 1. In FEDERALIST NO. 78, Hamilton emphasized the importance of life tenure as the cornerstone of an independent judiciary:

> If, then, the courts of justice are to be considered as the bulwarks of a limited Constitution against legislative encroachments, this consideration will afford a strong argument for the permanent tenure of judicial offices, since nothing will contribute so much as this to that independent spirit in the judges which must be essential to the faithful performance of so arduous a duty. . . .
>
> . . .
>
> . . . Periodical appointments, however regulated, or by whomsoever made, would, in some way or other, be fatal to their necessary independence.

THE FEDERALIST NO. 78, at 469-71 (Alexander Hamilton) (Clinton Rossiter ed. 1961). Hamilton further explained that the election of judges, either directly or indirectly through the people's representatives, was fundamentally inconsistent with an independent judiciary because "there would be too great a disposition to consult popularity to justify a reliance that nothing would be consulted but the Constitution and the laws." THE FEDERALIST NO. 78, at 471 (Alexander Hamilton).

The ICJ suffers from the very evils from which the Framers sought to protect the federal judicial system. The ICJ's members are elected by the United Nations, in separate but simultaneous ballots by both the General Assembly and the Security Council. ICJ Statute, June 26, 1945, arts. 4-10, 59 Stat. 1055. Moreover, the term of an ICJ judge is limited to nine years. ICJ Statute, June 26, 1945, art. 13, 59 Stat. 1055. Under this regime, an ICJ judge seeking election or reelection must curry the favor not only of his or her own country, but of a majority of countries in the General Assembly and the Security Council. This appointment process accompanied by limited tenure is the very antithesis of the independence guaranteed by Article III.

C. The Court's Precedents Foreclose Petitioner's Argument That ICJ Judgments Bind The Courts Of This Country.

Although this Court has upheld congressional delegations of judicial authority to federal administrative agencies and other non-Article III entities in narrowly defined circumstances, none of those cases support the validity of an international tribunal of elected foreign officials exercising binding judicial power over this Court and all other American courts. Indeed, the reasoning of these cases confirms that such authority cannot be delegated by Congress to a non-Article III court.

This Court's decision in *Schor* is particularly instructive. There, the Court held that the "limited jurisdiction that the [Commodities Futures Trading Commission

("CFTC")] asserts over state law claims as a necessary incident to the adjudication of federal claims willingly submitted by the parties for initial agency adjudication does not contravene separation of powers principles or Article III." 478 U.S. at 857. As this holding suggests, several limiting principles were critical to the Court's decision sustaining the delegation to the CFTC of adjudicatory authority over state law counterclaims. First, the parties had willingly submitted to the CFTC's jurisdiction. Second, the ruling of the CFTC was "initial" in that it was subject to the "supervision" and "control" of Article III reviewing courts. *Id.* at 855. Third, the ruling related to "'a class of questions of fact which are peculiarly suited to examination and determination by an administrative agency specially assigned to that task.'" *Id.* at 856 (citation omitted). Fourth, the delegation of authority to hear state law counterclaims yielded significant efficiencies that were necessary to realize "the purposes of the reparations procedure," which was intended to provide a streamlined administrative dispute resolution mechanism between commodities futures brokers and their clients. *Id.*[4]

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[4] These same concerns underlay the Court's decision in *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568 (1985): (1) the Court emphasized that no "unwilling defendant" would be subject to the arbitration process at issue because it applied only to registrants that "explicitly consent" to the process, *id.* at 591, 592; (2) the decisions were subject to judicial review, albeit limited to the partiality of the arbitrators and the requirements of due process, *id.* at 592-93; (3) the subject matter at issue was highly technical and was part of a "complex regulatory scheme" implicating questions "'peculiarly suited to examination and determination by an administrative agency specially assigned to that task.'" *Id.* at 589 (quoting *Crowell v. Benson*, 285 U.S. 22, 46 (1932)); and (4) the arbitration process was necessary to ensure the "prompt" and "inexpensive" resolution of the issues at stake. *Id.* at 590.

Obviously, none of these considerations counsel in favor of the delegation to the ICJ of binding, final judicial authority over federal law issues arising under the Vienna Convention. First, the State of Texas did not willingly submit to the jurisdiction of the ICJ. Second, the ruling of the ICJ is not "initial," but rather purports to be "final and without appeal." ICJ Statute, June 26, 1945, art. 60, 59 Stat. 1055. Third, the interpretation of federal treaty obligations falls well within the expertise of the federal judiciary, and no resort to the expertise of a foreign tribunal is necessary. Fourth, there are no efficiency gains to be realized by adding another layer of judicial review to the habeas corpus process.

In short, this Court's approval of certain narrow congressional delegations of adjudicatory authority to expert federal administrative bodies in no way validates the sweeping delegation by treaty of binding, final adjudicatory authority over federal law issues to an international tribunal composed of elected representatives of foreign nations.

II. VESTING THE ICJ WITH BINDING JUDICIAL POWER WOULD VIOLATE THE APPOINTMENTS CLAUSE.

Nor can Petitioner's contentions regarding the binding nature of the ICJ's judgment in *Avena* be squared with the Appointments Clause of Article II, Section 2 of the Constitution. Because it is undisputed that the judges of the ICJ were not appointed in a manner that comports with that clause, the ICJ simply cannot constitutionally exercise the judicial power to issue binding orders enforcing federal law in state criminal cases.

The Appointments Clause provides, in relevant part, that the President

> shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. CONST. art. II, § 2, cl. 2. This Court has emphasized on numerous occasions that the Appointments Clause "is more than a matter of 'etiquette or protocol,'" but rather "is among the significant structural safeguards of the constitutional scheme." *Edmond v. United States*, 520 U.S. 651, 659 (1997) (quoting *Buckley v. Valeo*, 424 U.S. 1, 125 (1976)). *See also Freytag v. Commissioner*, 501 U.S. 868, 878, 880 (1991); *Ryder v. United States*, 515 U.S. 177, 182 (1995).

Buckley and subsequent decisions make clear that an official who "exercise[es] significant authority pursuant to the laws of the United States is an 'officer of the United States,' and must, therefore, be appointed in the manner prescribed by" the Appointments Clause. *Buckley v. Valeo*, 424 U.S. 1, 126 (1976). *See also Edmond*, 520 U.S. at 662; *Freytag*, 501 U.S. at 881.[5] If such an officer is considered to be a "principal" officer, Article II requires that he be appointed through the process of Presidential nomination and Senate confirmation. If the officer is considered to be an "inferior" officer, Article II authorizes Congress to provide for his appointment directly by the President alone, by the "Courts of Law," or by the "Heads of Departments." U.S. CONST. art. II, § 2, cl. 2. *See Morrison v. Olson*, 487 U.S. 654, 670 (1988).

There can be no doubt that under petitioner's conception of the Vienna Convention, the ICJ in *Avena* exercised "significant authority pursuant to the laws of the United States," *Buckley*, 424 U.S. at 126, when it ordered the United States to "review and reconsider" petitioner's conviction and sentence. Again, petitioner's entire case is predicated on the proposition that the Vienna Convention is "self-executing" and enforceable as a matter of *federal* law as well as international law, and that ICJ decisions interpreting and applying its provisions have binding force and effect as *federal* law, both in state and federal courts.

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[5] *See also* John C. Yoo, *The New Sovereignty and the Old Constitution: The Chemical Weapons Convention and the Appointments Clause*, 15 CONST. COMMENTARY 87, 102 (1998) (hereinafter "*Yoo, New Sovereignty*"); John C. Yoo, *Rejoinder: Treaty Interpretation and the False Sirens of Delegation*, 90 CALIF. L. REV. 1305, 1335-37 (2002) (hereinafter "*Yoo, Rejoinder*"); Alan B. Morrison, *Appointments Clause Problems in the Dispute Resolution Provisions of the United States-Canada Free Trade Agreement*, 49 WASH. & LEE L. REV. 1299, 1302 (1992) (hereinafter "*Morrison*"); Jim C. Chen, *Appointments With Disaster: The Unconstitutionality of Bi-National Arbitral Review Under the United States-Canada Free Trade Agreement*, 49 WASH. & LEE L. REV. 1455, 1481 (1992) (hereinafter "*Chen*"). *See generally* Julian G. Ku, *The Delegation of Federal Power to International Organizations: New Problems with Old Solutions*, 85 MINN. L. REV. 71, 109-10 (2000) (hereinafter "*Ku*").

See supra, at 2-3.[6] Indeed, petitioner goes so far as to argue that the ICJ's decision requires this Court either to ignore or to overrule its decision in *Breard v. Greene*, 523 U.S. 371 (1998), which held that an Article 36 claim is subject to a state's procedural default rules. Pet. Br. at 44. Obviously, if petitioner is correct, the ICJ is vested with "significant authority pursuant to the laws of the United States." *Buckley*, 424 U.S. at 126. *See also Chen*, 49 WASH. & LEE L. REV. at 1481 ("[A]s adjudicators of rights arising under treaties and statutes of the United States, [members of adjudicatory panel established under United States-Canada Free Trade Agreement] exercise at least as much authority as special trial judges in the Tax Court, who are considered inferior officers of the United States rather than mere employees."); *Morrison*, 49 WASH. & LEE L. REV. at 1302. It necessarily follows that ICJ judges must be qualified as "officers" of the United States within the meaning of the Appointments Clause.

And it is clear, moreover, that ICJ judges must qualify as "principal" officers, as opposed to "inferior" officers. As this Court held in *Edmond*, "in the context of a clause designed to preserve political accountability relative to important government assignments, we think it evident that 'inferior officers' are officers whose work is directed and supervised at some level by others who are appointed by Presidential

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[6] *Cf.* Curtis A. Bradley, *International Delegations, the Structural Constitution, and Non-Self-Execution*, 55 STAN. L. REV. 1557, 1572 (2003) (hereinafter "Bradley") ("Some commentators have nevertheless argued that the [ICJ's order in the *Avena* and *LeGrand* cases] were binding on the United States and should have been enforced by U.S. authorities, including the Supreme Court. In effect, these commentators argue that the orders had the status of self-executing federal law that automatically superseded the relevant state law.").

nomination with the advice and consent of the Senate." 520 U.S. at 663; *see also id.* at 667 (Souter, J., concurring in part) ("Because the term 'inferior officer' implies an official superior, one who has no superior is not an inferior officer."). The ICJ is not subject to any direct or even indirect supervision by any principal officer of the United States, and its decisions are not reviewable by any United States official or court. To the contrary, ICJ decisions, according to petitioner, are binding on all American courts and officials, both state and federal. Because ICJ judges must be principal officers under petitioner's theory of the case, the Appointments Clause requires that they be appointed through Presidential nomination and Senate confirmation.

Ultimately, however, the characterization of the ICJ judges as principal or inferior officers has no bearing on the outcome of this case, since it is undisputed that the judges were not appointed in accordance with the Appointment Clause's requirements for *either* principal officers or inferior officers. As noted earlier, the fifteen member judges of the ICJ are elected to their positions by members of the United Nations General Assembly and that body's Security Council. Thus, whether considered inferior or principal officers, the "appointment" of the judges of the ICJ simply does not comport with the requirements of the Appointments Clause.

Finally, some commentators have suggested that the Appointments Clause does not apply at all to individuals who are not employed within the federal government.[7]

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[7] *See, e.g.*, *Ku*, 85 MINN. L. REV. at 118 n.166; Memorandum from Assistant Attorney General Walter Dellinger to the General Counsels of the Federal Government, *The Constitutional Separation of Powers*

(Continued on following page)

This suggestion, however, is flatly inconsistent with one of the key purposes of the Appointments Clause – to bolster the accountability and responsiveness of government officers by ensuring that those who exercise governmental authority are properly appointed by officials who can be held politically accountable for their actions. As this Court noted in *Ryder*, 515 U.S. at 182, the Appointments Clause "is a [bar] against one branch aggrandizing its power at the expense of another branch, but it is more: 'it preserves another aspect of the Constitution's structural integrity by preventing the diffusion of the appointment power.'" 515 U.S. at 182 (quoting *Freytag*, 501 U.S. at 878). "The Framers understood . . . that by limiting the appointment power, they could ensure that those who wielded it were accountable to political force and the will of the people." *Freytag*, 501 U.S. at 884.[8]

Because the "structural interests protected by the Appointments Clause are not those of any one branch of government but of the entire Republic," *Freytag*, 501 U.S. at 880, Congress cannot evade the requirements of the

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Between the President and Congress, 1996 OLC LEXIS 6, at *67-75 (May 7, 1996).

[8] *See also Edmond*, 520 U.S. at 660 ("[T]he Appointments Clause was designed to ensure public accountability for both the making of a bad appointment and the rejection of a good one."); *Weiss v. United States*, 510 U.S. 163, 186 (1994) (Souter, J., concurring) ("[I]n the Framers' thinking, the process on which they settled for selecting principal officers would ensure 'judicious' appointments not only by empowering the President and the Senate to check each other, but also by allowing the public to hold the President and Senators accountable for injudicious appointments."); The Federalist No. 77 (Alexander Hamilton) (Clinton Rossiter ed.); 3 Joseph Story, Commentaries on the Constitution of the United States § 1525 (1833); *Bradley*, 55 Stan. L. Rev. at 1563; *Yoo, New Sovereignty*, 15 Const. Commentary at 105; *Yoo, Rejoinder*, 90 Calif. L. Rev. 1336.

Appointments Clause and undermine its purposes by effectively transferring the power to appoint officials to an international organization. Thus, "[v]iolation of the Appointments Clause occurs not only when . . . Congress may be aggrandizing *itself* (by effectively appropriating the appointment power over the officer exercising the new duties), but also when Congress, *without* aggrandizing itself, effectively lodges appointment power in any person other than those whom the Constitution specifies." *Weiss*, 510 U.S. at 196 (Scalia, J., concurring in part) (emphases in original). *See also Printz v. United States*, 521 U.S. 898, 922-23 (1997). Lodging the power to exercise significant federal authority in an international body composed of elected representatives of foreign nations runs contrary to the democratic accountability principles underlying the Appointments Clause and undermines its purpose to "ensure that those who wielded [the appointment power] were accountable to political force and the will of the people." *Freytag*, 501 U.S. at 884.[9]

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[9] This Court has held in analogous contexts that the federal government may not avoid the structural requirements of the Constitution by transferring duties arising under federal law to other governmental entities. Thus, in *Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise*, 501 U.S. 252, 266 (1991), this Court found that the fact that a board of review overseeing the board of directors for an airports authority was created and empowered as a matter of state law did not shield federal legislation concerning the board of review from scrutiny – and invalidation – under the separation of powers doctrine, since the federal legislation called upon the states at issue to establish the board of review as a condition to the transfer of federal property. This Court held that the circumstances underlying the establishment of the board of review indicated that that board "necessarily exercise[d] sufficient federal power as an agent of Congress to mandate separation-of-power scrutiny. Any other conclusion would permit Congress to evade the 'carefully crafted' constraints of the Constitution, simply by delegating primary responsibility for execution

(Continued on following page)

In sum, acceptance of petitioner's view of the binding judicial power of the ICJ would lead inexorably to the conclusion that the federal government violated the Appointments Clause in delegating such power under federal law to an international tribunal.

◆

CONCLUSION

For the foregoing reasons, petitioner's interpretation of the ICJ's authority under the Vienna Convention raises grave constitutional questions and thus should not be adopted. *See, e.g., Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *see also NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 499-501, 504 (1979). If the Court were to adopt petitioner's interpretation, the Court should rule that the ICJ's exercise of federal judicial power under the Optional Protocol of the Vienna Convention is unconstitutional.

Respectfully submitted,

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of national policy to the States. . . ." *Id.* at 269-70 (quoting *INS v. Chadha*, 462 U.S. 919, 959 (1983)). For the reasons discussed above, a similar analysis obtains here.

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IN THE

Supreme Court of the United States

JOSÉ ERNESTO MEDELLÍN,
Petitioner,

vs.

DOUG DRETKE, Director, Texas Department of Criminal Justice, Correctional Institutions Division,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. In light of the decision of the International Court of Justice in the *Avena* case, should this Court overrule its precedent in *Breard* v. *Greene*, to the extent it is inconsistent with *Avena*?

If the answer to Question 1 is yes, the following questions are fairly included and required for resolution of the case:

2. Does *Avena* require suppression of a duly Mirandized confession obtained a few hours after arrest and before any duty to notify the consulate is overdue?

3. When a federal district court has rejected an *Avena* claim on the merits as well as procedural default, does 28 U. S. C. § 2253(c) permit a certificate of appealability to review that nonconstitutional claim on appeal?

4. When a state court has rejected an *Avena* claim on the merits as well as on procedural default, does *Avena* require or federal law permit reexamination of that nonconstitutional claim on federal habeas?

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IN THE

Supreme Court of the United States

JOSÉ ERNESTO MEDELLÍN,

Petitioner,

vs.

DOUG DRETKE, Director, Texas Department of Criminal
Justice, Correctional Institutions Division,

Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

In the present case, petitioner seeks further review of an issue decided against him on the merits by the state court, which involves neither jurisdiction nor constitutional rights. He seeks an overruling of this Court's decision in *Breard* v. *Greene*, without resolution of the host of issues such a reversal would raise. Such a decision would create chaos in the lower courts. It would further delay justice in cases such as the present one, where justice is already overdue and where the absence of any prejudice from the Vienna Convention violation is obvious. Such a result is contrary to the interests CJLF was formed to protect.

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[1] This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

Both parties have given written consent to the filing of this brief.

SUMMARY OF FACTS AND CASE

Petitioner's statement of the case makes no mention of the facts of the unspeakably brutal crimes committed by José Medellín and his pack of predators. See Pet. Brief 1-13. However, these facts are essential to understanding just how weak his claim of prejudice is. Cf. *Strickland* v. *Washington*, 466 U. S. 668, 700 (1984) ("Given the overwhelming aggravating factors . . .").

On the night of June 24, 1993, 14-year-old Jennifer Ertman and 16-year-old Elizabeth Pena were taking a shortcut home when they encountered a gang called the Blacks and Whites, including the petitioner, José Medellín. *Medellín* v. *State*, No. 71,997 (Tex. Crim. App., May 16, 1997), App. to Pet. for Cert. 4a. "When Elizabeth tried to run from appellant, he grabbed her and threw her to the ground. Elizabeth screamed for Jennifer to help her. In response to her friend's cries, Jennifer ran back to help, but [two other gang members] grabbed her and threw her down as well." *Ibid.* The group then proceeded to have "fun" by brutally gang raping both girls, and they bragged about it afterward. See *id.*, at 5a.

"Appellant related to [the brother and sister-in-law of one of the gang members] that he sexually assaulted one of the girls and bragged about having 'opened' her since she apparently had been a virgin. As if to accentuate his conquest, appellant showed Christina his blood soaked underwear. Appellant related that after another gang member sexually assaulted the second girl, he 'turned her around' and anally raped her." *Ibid.* The gang murdered the girls to prevent them from identifying their attackers and divided up their possessions. See *id.*, at 5a-6a. Medellín personally "took off one of his shoelaces and strangled at least one of the girls with it." *Id.*, at 6a.

The evidence against Medellín included his written statement after arrest, in which he admitted substantial participation in the crimes, see *id.*, at 6a; J. A. 14-18, including his personal participation in strangling Elizabeth. J. A. 17. This statement was made between 5:54 a.m. and 7:23 a.m. on the day of his arrest, June 29, 1993. J. A. 14-15. Medellín informed the authorities that he was born in Mexico in a pretrial services interview 6½ hours later, at 2:55 p.m. See App. to Pet. for Cert. 165a, 171a. Medellín was not advised that he had a right to have the Mexican Consulate notified, nor was the consulate notified.

Medellín was convicted of capital murder and sentenced to death, and the Texas Court of Criminal Appeals affirmed on direct appeal. *Id.*, at 3a. After the affirmance, Mexican consular authorities learned of the case and actively assisted in the preparation of Medellín's state habeas petition. Pet. Brief 6-7. The only prejudice from the Vienna Convention violation claimed by the Consul General was that, if they had been notified prior to interrogation, they would have advised him to assert his *Miranda* right to have counsel present during interrogation. App. to Pet. for Cert. 172a-173a. The Consul General's affidavit does not make any claim that the consulate would have arranged for a more effective defense at trial. In addition to procedural default and standing grounds, the state habeas judge also rejected Medellín's Vienna Convention claim on the merits:

> "16. In the alternative, the applicant fails to show that he was harmed by any lack of notification to the Mexican consulate concerning his arrest for capital murder; the applicant was provided with effective legal representation upon the applicant's request; and, the appli-

> cant's constitutional rights were safeguarded . . . ." *Id.*, at 56a.
>
> "17. The applicant . . . fails to show that any non-notification of the Mexican authorities impacted on the validity of his conviction or punishment. *Ex parte Barber*, 879 S. W. 2d 889, 891-92 (Tex. Crim. App. 1994) (holding that, in order to be entitled to habeas relief, defendant must plead and prove that complained-of error did, in fact, contribute to his conviction or punishment)." *Id.*, at 57a.

The Court of Criminal Appeals accepted the trial court's findings and conclusions on October 3, 2001. *Id.*, at 32a-33a.

Medellín filed a federal habeas petition on November 28, 2001 and amended it the following July. The petition raised Sixth Amendment and Due Process issues, in addition to the Vienna Convention issue. See *Medellín* v. *Cockrell*, No. H-01-4078 (SD Tex., June 25, 2003), App. to Pet. for Cert. 62a. Like the state habeas court, the Federal District Court rejected the Vienna Convention claim on the merits as well as on procedural grounds. "The police officers informed Medellín of his right to legal representation before he confessed to involvement in the murders. Medellín waived his right to advisement by an attorney. Medellín does not challenge the voluntary nature of his confession. There is no indication that, if informed of his consular rights, Medellín would not have waived those rights as he did his right to counsel. Medellín fails to establish a 'causal connection between the [Vienna Convention] violation and [his] statements.' (Citation.) Petitioner has failed to show prejudice for the Vienna Convention violation." *Id.*, at 84a-85a (footnote omitted).

The Court of Appeals denied a certificate of appealability. *Medellín* v. *Dretke*, 371 F. 3d 270, 281 (CA5 2004). On the procedural default point, the Court of Appeals held it was bound by this Court's decision in *Breard* v. *Greene*, 523 U. S. 371, 375 (1998), until such time as this Court overrules it. See 371 F. 3d, at 280. On the question of standing, the panel followed circuit precedent. See *ibid.*

SUMMARY OF ARGUMENT

In the event that the Court decides to accommodate the *Avena* decision, there are a number of issues that can and should be resolved in the present case.

First, the taking of a properly Mirandized confession promptly upon arrest, the only prejudice asserted in state court in this case, is rarely, if ever, the product of a Vienna Convention violation. *Avena* held that notification of the consulate does not become overdue until long after the typical postarrest interrogation, and informing the arrestee of consular rights on top of the *Miranda* warning is highly unlikely to have any effect, as two courts have already found in the present case.

When no state court has ruled on the merits, a decision to follow *Avena* would render state remedies unexhausted, unless there has been a post-notification default. A decision that a treaty overrides procedural default rules would apply to state rules as well as this Court's *Wainwright* v. *Sykes* rule. However, in a case where a petitioner failed to raise the Vienna Convention in a proceeding after the consulate has actual knowledge of the case, *Avena*'s rationale for overriding the procedural default rule is inapplicable, and such claims would still be defaulted.

When a federal district court has adjudicated a state prisoner's Vienna Convention claim on habeas corpus, the decision cannot be appealed. Under 28 U. S. C. § 2253(c)(2), only constitutional claims can be appealed. Extraordinary remedies may be available, but they should be reserved for truly extraordinary cases.

Where a state court has adjudicated the Vienna Convention claim on the merits, the claim cannot be reexamined in federal habeas. *Avena* does not require it, and the rule of *Reed* v.

Farley prohibits it. The claim is neither fundamental, jurisdictional, nor constitutional.

ARGUMENT

In *Breard* v. *Greene*, 523 U. S. 371 (1998) (*per curiam*),[2] this Court rejected an argument based on the Vienna Convention for three reasons. First, in international law generally and the Vienna Convention particularly, the procedural rules of the forum State govern the assertion of rights under the treaty, and for criminal cases in the United States, that includes the procedural default rule. *Id.*, at 375. Second, treaty rights do not stand on any higher plane than federal statutory rights or constitutional rights, and these are subject to the procedural default rule. *Id.*, at 376. Third, Breard's claim of prejudice, *i.e.*, that the treaty violation actually affected his case, was at best speculative. *Id.*, at 377.

Petitioner and supporting *amici* advance a variety of reasons for not following *Breard*, at least on the procedural default point, based on the decision of the International Court of Justice in *Case Concerning Avena and Other Mexican Nationals* (*Mex.* v. *U. S.*), 2004 I. C. J. 1 (Mar. 31), (cited below as "*Avena*"). See, *e.g.*, Brief for Government of the United Mexican States as *Amicus Curiae* 1-4. Respondent will, we understand, submit several weighty arguments as to why *Breard* was correctly decided and should continue to govern these cases.

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[2] Petitioner refers to *Breard* as a "per curiam order." See, *e.g.*, Pet. Brief 13. *Breard* is, in fact, a per curiam opinion. It is a precedent, although its force as such in this Court is somewhat less than that of an opinion issued after full briefing and argument. See *Hohn* v. *United States*, 524 U. S. 236, 251 (1998). Nonetheless, it is a binding precedent on all the other courts of the Nation, and the Court of Appeals was therefore entirely correct to follow it unless and until this Court sees fit to overrule it. See *id.*, at 252-253.

This brief will address a different question, but one that is fairly included in the question posed by petitioner. *If* this Court does decide to accommodate the decision in *Avena*, what happens next? Petitioner does not address this question in any depth, but his conclusion seems to assume that the case would go back to the Court of Appeals, to proceed directly to the merits. Pet. Brief 50. *Amicus* CJLF submits that is not correct. The *Avena* decision does not require it, and the law of the United States does not permit it. Furthermore, to leave undecided the host of questions raised by an affirmative answer to petitioner's question would create chaos in the lower courts that could only further delay justice in cases where justice is already long overdue.

I. Petitioner's confession was not the result of a Vienna Convention violation.

A. The Avena Decision.

The *Avena* decision involved the claims of 54 Mexican nationals, including the petitioner in the present case, José Medellín. *Avena*, *supra*, ¶ 16 (case number 38). The International Court of Justice (ICJ) rejected many of Mexico's claims regarding the nature of the Vienna Convention notification requirement and the consequences of noncompliance.

Most importantly, the court rejected the claim that the treaty violation alone necessarily required "partial or total annulment of conviction or sentence as the necessary and sole remedy." ¶ 123. Instead, a causal connection must be shown that "the violations . . . ultimately led to convictions and severe penalties . . . ." ¶ 122. In other words, the burden is on the petitioner to show "actual prejudice." ¶ 121. In this aspect, *Avena* is entirely consistent with *Breard*'s alternative holding, that even if a Vienna Convention claim is properly raised and a violation proved, relief from the criminal judgment requires "a showing that the violation had an effect on the trial." 523 U. S., at 377.

B. *Exclusion of Confessions.*

The *Avena* decision rejected Mexico's claim that in any retrial after the finding of a violation, any statement or confession obtained prior to notification to the arrestee of his consular rights must be suppressed. Instead, the confession issue is to be considered in each case as a part of the review process. *Avena, supra,* ¶¶ 126-127. That means a causal connection between the violation and obtaining the confession. In American exclusionary rule parlance, the confession must be the "fruit of the poisonous tree." See, *e.g.*, *United States* v. *Patane*, 542 U. S. __, 124 S. Ct. 2620, 2625, 159 L. Ed. 2d 667, 674 (2004).

Obviously, there is no causal connection when the confession precedes the violation. The ICJ rejected the claim that notice to the arrestee necessarily precede interrogation. *Avena, supra,* ¶ 85. During preparation of the Convention, suggested time periods for notification ranged from a minimum of 48 hours up to one month. ¶ 86. Without explanation, though, the ICJ nonetheless finds a duty to inform the arrested person as soon as he is known to be a foreign national or there are grounds to think he probably is. ¶ 88. The ICJ goes on to find a violation in the case of an arrestee whose birthplace was stated in the arrest report and who was informed 40 hours later. ¶ 89.

However, there is no comparable requirement of immediacy regarding actually notifying the consulate. The ICJ found no violation of the duty to notify the consulate "without delay" when notice was given five calendar days and three working days after arrest. See *Avena, supra,* ¶ 97. Unlike the *Miranda* rule, the Vienna Convention notification provisions were not drafted with interrogation in mind. "[D]uring the Conference debates on this term, no delegate made *any connection* with the issue of interrogation." ¶ 87 (emphasis added); cf. *Miranda* v. *Arizona*, 384 U. S. 436, 445 (1966) (deciding admissibility of statements obtained during custodial interrogation). Unlike a request for counsel under *Miranda*, there is no requirement under *Avena* to refrain from interrogation until a request for consular notification has been fulfilled. Cf. *Miranda, supra,* at 473-474. Also unlike *Miranda*, there is no waiver to be made as a condition for interrogation. Cf. *id.*, at 479.

Given a proper administration of *Miranda* warnings, a knowing and voluntary waiver of the right to have counsel during interrogation, and interrogation taking place promptly after arrest, there will rarely, *if ever* be a causal connection between failure to give the consular information before interrogation and obtaining the confession. Indeed, if the confession and the information of nationality are obtained in the same interview, or if nationality is learned later, there is no violation at all.

In the present case, Medellín gave his confession within a few hours of arrest. See *supra*, at 3. The Consul General says he would have told Medellín to assert his *Miranda* rights if the *consulate* had been notified prior to interrogation, see App. to Pet. for Cert. 172a, but such swift notification of the consulate (as opposed to the arrestee) is not required by *Avena*. Even in the unlikely event that failure to inform Medellín himself was a violation, a causal connection between that violation and the confession is every bit as speculative as the one rejected in *Breard*. 523 U. S., at 377. The District Court's finding of no prejudice, App. to Pet. for Cert. 84a-85a, and the state habeas court finding to the same effect are both amply supported by the facts.

Petitioner asks this Court to order the Court of Appeals to issue a certificate of appealability (COA). That requires a substantial showing on both his procedural issue and on the merits of his claim. See *infra*, at 16-17. Putting to one side for the moment the statutory requirement that the claim be constitutional, discussed in Part IV-A, *infra*, he has made no showing at all of a debatably meritorious claim. The taking of his confession was not a violation, and his claim of prejudice from the later violation is stated only in the most general and conclusory terms. See Pet. Brief 5-6, 41-42. Although in *Slack* v. *McDaniel*, 529 U. S. 473, 485 (2000), petitioner was permitted to make his merits showing on remand, that was only because the requirements had been unclear up to that point. In this post-*Slack* proceeding, petitioner has utterly failed to meet a clearly established requirement for a COA, and that alone is sufficient to affirm denial of the COA.

II. Ineffective assistance as "cause" provides the model for accommodating *Avena*'s holding on procedural default.

The only aspect of *Avena* that would require a significant change in American practice to accommodate is its holding on procedural default. Analysis of this aspect must begin with the ICJ's understanding of the procedural default rule. Quoting Mexico's argument, *Avena* defines the procedural default rule this way: " 'a defendant who could have raised, but fails to raise, a legal issue *at trial* will generally not be permitted to raise it in future proceedings, on appeal or in a petition for a writ of *habeas corpus*'." *Avena, supra,* ¶ 111 (first emphasis added);[3] see also ¶ 133. This is the trial default rule of *Wainwright* v. *Sykes*, 433 U. S. 72 (1977). Presumably, the word "generally" in this definition recognizes the cause-and-prejudice and actual innocence exceptions. Significantly, *Avena*'s definition excludes defaults at stages of the proceedings later than trial. Statements in the *Avena* opinion referring to the "procedural default rule" therefore do not necessarily refer to later defaults, and they should only be extended to such defaults when the underlying rationale of the opinion so requires.

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[3] The opinion continues at that point: "The rule requires exhaustion of remedies, *inter alia*, at the state level and before a *habeas corpus* motion can be filed with federal courts." This is not technically correct. Exhaustion and procedural default are separate, although related, rules. See, *e.g.*, *O'Sullivan* v. *Boerckel*, 526 U. S. 838, 848 (1999); *id.*, at 850-851 (Stevens, J., dissenting). The ICJ may have been misled in this respect by the abbreviated description in *Breard*. 523 U. S., at 375.

The underlying rationale of the procedural default holding is that no "provision has been made to prevent [the procedural default rule's] application in cases where it has been the failure of the United States itself to inform that may have precluded counsel from being in a position to have raised the question of a violation of the Vienna Convention in the initial trial." *Avena, supra,* ¶ 113. This rationale is flawed. When the state has provided or the defendant has retained competent counsel, the failure to inform does not preclude counsel from raising the Vienna Convention issue. When defense counsel is ineffective, that ineffectiveness is both cause for default and an independent claim for relief. See *Murray* v. *Carrier*, 477 U. S. 478, 488-489 (1986).[4]

If this Court should decide that the Optional Protocol requires the United States to accept this rationale despite its flaw, then *Carrier* provides the guide to accommodate *Avena* within the framework of American habeas corpus jurisprudence:

> "[I]f the procedural default is the result of ineffective assistance of counsel, the Sixth Amendment itself requires that responsibility for default be imputed to the State, which may not 'conduc[t] trials at which persons who face incarceration must defend themselves without adequate legal assistance.' *Cuyler* v. *Sullivan*, 446 U. S. 335, 344 (1980). Ineffective assistance of counsel, then, is cause for a procedural default." 477 U. S., at 488.

Where the denial of assistance that defendant was entitled to receive is the cause of a default, that denial is sufficient for the cause prong of the *Sykes* test. If the Court accepts *Avena*'s assumption of a causal connection between the failure to notify the consulate and the default of the Vienna Convention claim, then the analogy is complete. *Strickler* v. *Greene*, 527 U. S. 263, 288-289 (1999) is similar, where the prosecutor's inadvertent nondisclosure of impeachment evidence was both an element of the petitioner's *Brady*[5] claim and cause for his failure to raise it in state court.

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[4] In the present case, Medellín attacked trial counsel's performance on multiple grounds, but failure to raise the Vienna Convention issue and failure to contact the consulate himself were not among them. See App. to Pet. for Cert. 62a.

The violation-as-cause rationale only extends to defaults occurring before the violation is corrected. In *Gray* v. *Netherland*, 518 U. S. 152, 162 (1996), unlike *Strickler*, the evidence which had not been disclosed to defense counsel before trial was known to habeas counsel before he filed his state habeas petition. Hence, it was defaulted by failure to raise it in that proceeding. Similarly, failure to notify the consulate, or to inform the defendant of his right to have the consulate notified, has no causal connection whatever to any default occurring after the consulate has actual knowledge, whether through official channels or any other means. *Avena* is concerned with cases where "application of the procedural default rule would have the effect of preventing 'full effect [from being] given to the purposes for which the rights accorded under this article are intended', and thus violate paragraph 2 of Article 36." *Avena*, *supra*, ¶ 113. Once the consulate has actual notice, it is not prevented from assisting the defendant in presenting his Vienna Convention claim in the next available procedure, as in fact it did in the present case, Pet. Brief 6-7, and any prior lack of notice would not be cause for a default beyond that point. Cf. *Avena*, *supra*, ¶¶ 104, 106(4) (no breach of duty to enable consulate to arrange representation in cases where consulate learned of arrest, by whatever means, before trial). Application of the procedural default rule to default after actual notice would not be a violation of paragraph 2 of Article 36 as construed by *Avena*.

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[5] *Brady* v. *Maryland*, 373 U. S. 83 (1963).

III. A decision that *Avena*'s procedural default holding is binding on American courts would apply to state courts as well as federal, and it would render many claims unexhausted.

Unlike most of the countries of the world, the United States of America is a federation. In its *Avena* decision, the International Court of Justice dealt with the United States as a whole and did not purport to resolve the questions of federalism that come with compliance. The court quoted its earlier decision in *LaGrand* (*Germany* v. *United States*) 2001 I. C. J 466, ¶ 128 (June 27), that " 'the United States of America, *by means of its own choosing*, shall allow the review and reconsideration of the conviction and sentence' . . . ." *Case Concerning Avena and Other Mexican Nationals* (*Mex.* v. *U. S.*), 2004 I. C. J. 1, ¶ 131(Mar. 31). *Avena* modified this holding by specifying "that the process of review and reconsideration should occur within the overall judicial proceedings relating to the individual defendant concerned," ¶ 141, as opposed to executive clemency, but otherwise left the choice of means to the United States. Thus, the requirement of review "by the United States courts," ¶ 121, does not necessarily mean by federal courts.

Concerns of federalism permeate this Court's habeas corpus jurisprudence, see, *e.g.*, *Coleman* v. *Thompson*, 501 U. S. 722, 726 (1991), as well as Congress's most recent word on the subject, the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), §§ 101-107, 110 Stat. 1214. If the judicial system of the United States is going to accommodate the *Avena* decision, then the distinct responsibilities of the state and federal courts need to be addressed.

The first question is whether a decision by this Court to accommodate *Avena* would have any binding effect on state courts. Some aspects of this Court's habeas corpus jurisprudence are binding equally on state and federal courts, while others are only rules of practice for federal courts. To determine the status of a rule in this regard, it is necessary to identify its origin.

The cause and prejudice test for procedural default had its origins in a federal prisoner case under 28 U. S. C. § 2255 and took its cause standard from Federal Rule of Criminal Procedure 12(b)(2). See *Davis* v. *United States*, 411 U. S. 233, 242 (1973). As later developed and applied to state prisoner petitions, it is largely a device to prevent evasion of the exhaustion rule, see *O'Sullivan* v. *Boerckel*, 526 U. S. 838, 848 (1999), which is a limitation on federal courts to protect the integrity of state procedures. Since it is based neither on the Constitution nor on a federal statute applicable to state courts, it is not binding on them. State courts can and do adopt different tests for procedural default. See, *e.g.*, *In re Harris*, 5 Cal. 4th 813, 825, n. 3, 829-841, 855 P. 2d 391, 395, n. 3, 398-405 (1993).

Retroactivity analysis, on the other hand, is binding on the states. Although they have no obligation to provide collateral review at all, once a state does provide collateral review it must apply retroactively any decision of this Court that would apply retroactively in a federal collateral review. See *Yates* v. *Aiken*, 484 U. S. 211, 217-218 (1988). Because the decision itself is a constitutional rule, the Court's decision regarding its temporal reach is similarly binding on state courts.

Self-executing treaties are also binding on state courts. A treaty stands in the same place in the federal hierarchy of laws as a federal statute. See 1 R. Rotunda & J. Nowak, Treatise on Constitutional Law § 6.7, pp. 581-582 (3d ed. 1999). It is subordinate to the Constitution and to later-enacted statutes, but it is superior to contrary state law. In its only express reference to judicial review, the Constitution makes treaties, along with itself and federal statutes, "the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the Constitution or laws of any state to the contrary notwithstanding." U. S. Const., Art. VI, § 2. To the extent that the Optional Protocol overrides the procedural default rule, it overrides state procedural default rules, whether statutory or case law, as well as this Court's *Sykes* rule.

A treaty does not, however, override a later-enacted statute. See Rotunda & Nowak, *supra*, at 582. The pertinent later-enacted statute in this case, 28 U. S. C. § 2254(b), provides:

> "(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—
>
> "(A) the applicant has exhausted the remedies available in the courts of the State; or
>
> "(B)(i) there is an absence of available State corrective process; or
>
> "(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.
>
> "(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.
>
> "(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement."

In a case where no state court has decided a Vienna Convention claim on the merits and there is no operative default rule preventing its consideration in state court, the later-enacted AEDPA forbids the Federal District Court to grant relief on the merits. The court can deny the claim on the merits under subsection (2), if it is meritless, but otherwise it must deal with the unexhausted claim in the manner this Court decides this Term in *Rhines* v. *Weber*, No. 03-9046, either dismiss or stay.

In the present case, however, the state habeas court rested its decision on both the procedural default rule and the merits. The claim of prejudice by the Consul General dealt solely with Medellín's confession. See App. to Pet. for Cert. 172a-173a. The state habeas court found the showing unconvincing, see *id.*, at 84a-85a, just as this Court did with the plea bargain claim in *Breard*, 523 U. S., at 377. Since this claim was decided on the merits in state court, the question is what further review, if any, is required.

IV. Once a Vienna Convention claim has been decided on the merits, there is no right to review on federal habeas or on appeal in federal habeas.

In the present case, petitioner has received not one but at least two rulings on the merits of his claim that he was prejudiced by the failure to provide the notifications required by the Vienna Convention. Both the state habeas trial court and the Federal District Court ruled in the alternative that, even if the claim were not procedurally defaulted, petitioner had failed to show any prejudice resulting from the violation. App. to Pet. for Cert. 56a-57a, 84a-85a.[6] By claiming a right to a certificate of appealability (COA), petitioner is claiming a right to federal habeas review of the state court's decision and appellate review of the Federal District Court's decision. He is entitled to neither. *Avena* requires only a judicial review of the prejudice question "whatever may be the actual outcome of such review and reconsideration." *Avena, supra*, ¶ 139. Entitlement to any review of the review is solely a question of domestic American law.

A. The AEDPA Appeal Statute.

Whether he was entitled to it or not, a question discussed in Part IV-B, below, petitioner received a review of the state decision in the Federal District Court. He now wishes to appeal that decision to the Court of Appeals. He does not meet the criterion in the governing statute, 28 U. S. C. § 2253(c)(2), "a substantial showing of the denial of a *constitutional* right." (Emphasis added). An error on procedural default is not sufficient for a COA unless the substantive criterion of the statute is also met. See *Slack* v. *McDaniel*, 529 U. S. 473, 484-485 (2000).

Petitioner sought a COA on six grounds. Four of them related to his right to effective assistance of counsel under the Sixth Amendment, one was the Vienna Convention claim, and one was a claim under the Due Process Clause of the Fourteenth Amendment. See *Medellín* v. *Dretke*, 371 F. 3d 270, 274 (CA5 2004). The Court of Appeals held that petitioner's Sixth Amendment and Due Process Clause claims did not meet the statutory criterion, see *id.*, 275-281, and petitioner chose not to seek this Court's review of those holdings. See Pet. for Cert. i.

All that is left to decide is whether petitioner's Vienna Convention claim makes "a substantial showing of the denial of a constitutional right." To ask the question is to answer it. The Vienna Convention is not in the Constitution.

Surprisingly, petitioner's brief does not mention or cite the statute governing the relief he seeks or give any reason for departing from its plain meaning. Nor do any of the numerous supporting *amici*. We can only anticipate the arguments that might be made in the reply brief.

One argument might be that the use of the word "constitutional" in this statute was merely a drafting error and did not reflect the genuine intent of Congress. Even if we were to accept the premise that such an argument is legitimate, there is no evidence to support the drastic step of ignoring plain meaning. There is no conflict with other sections of the statute. No tortured construction is necessary to avoid unconstitutionality, because there is no constitutional right to an appeal. *Martinez* v. *Court of Appeal of Cal., Fourth Appellate Dist.*, 528 U. S. 152, 160 (2000). No contortion is necessary to avoid an absurd result, because the result is not absurd. As explained in the next section, constitutional claims have long had preferred treatment over statutory ones in habeas, and treaties stand on the same level as statutes.

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[6] The Texas Court of Criminal Appeals' brief order, *id.*, at 32a-33a, is presumably a third such ruling. See *Ylst* v. *Nunnemaker*, 501 U. S. 797, 803 (1991).

Prior to AEDPA, the standard for issuance of a certificate of probable cause was supplied by case law: " 'a substantial showing of the denial of a federal right.' " *Slack*, 529 U. S., at 480 (quoting *Barefoot* v. *Estelle*, 463 U. S. 880, 893 (1983)). As *Slack* explained, AEDPA codified the *Barefoot* standard except that it replaced the word "federal" with "constitutional." See *id.*, at 483. When Congress borrows language unchanged from another legal source, it is presumed to intend an unchanged meaning. See *Evans* v. *United States*, 504 U. S. 255, 259-260, and n. 3 (1992); *Williams* v. *Taylor*, 529 U. S. 420, 434 (2000). Conversely, when it makes a change in the language that is substantive and not stylistic, that change must be deemed deliberate. Congress meant what it said. Although the District Court has jurisdiction over statutory and treaty-based claims, see 28 U. S. C. § 2254(a), its decision denying these claims is not appealable by the petitioner. Indeed, there will rarely be anything to review on such claims. Jurisdiction to hear a claim does not mean that habeas corpus is a proper remedy to grant for it. See *Ex parte Watkins*, 3 Pet. (28 U. S.) 193, 201 (1830); Scheidegger, Habeas Corpus and the Legislative Power, 98 Colum. L. Rev. 888, 929-930 (1998). Under *Reed* v. *Farley*, 512 U. S. 339 (1994), discussed in the next section, habeas corpus as a collateral attack on a judgment is rarely, if ever, an available remedy for a claim based on neither the Constitution nor the jurisdiction of the court.

A final possibility would be the "bootstrap" argument. Since the Supremacy Clause requires state judges to enforce federal statutes and treaties, any failure to do so violates the Supremacy Clause of the Constitution and hence is a constitutional claim. Such an interpretation of the word "constitutional" in § 2253(c) would render the change made by Congress to the *Barefoot* standard a nullity, which is sufficient to refute it.

Congress's prohibition of review by the ordinary route does not, of course, foreclose all review of a district court's denial of a claim based on statute or treaty. In *Felker* v. *Turpin*, 518 U. S. 651, 660-661 (1996), this Court addressed a similar limitation on review of the successive petition "gatekeeper" decision and held that it did not repeal this Court's original habeas jurisdiction. See also *id.*, at 666 (Stevens, J., concurring); *id.*, at 667 (Souter, J., concurring) (other possibilities). These extraordinary measures must, however, remain extraordinary, and not be used routinely to circumvent the intent of Congress. See Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Bell* v. *Thompson*, No. 04-514, pp. 14-18. Whatever other means of review may be employed in another case, petitioner in this case has asked for a COA for a nonconstitutional claim, see Pet. Brief 50, and Congress has unambiguously forbidden it.

B. The Hill/Reed Rule.

The Reconstruction Congress extended the federal writ of habeas corpus to any person restrained of liberty in violation of the Constitution, laws, or treaties of the United States. See Scheidegger, *supra*, 98 Colum. L. Rev., at 932. This law, enacted primarily to rescue freedmen illegally held in continuing slavery, was originally understood to permit postconviction relitigation of issues already decided in criminal cases only when those issues went to the jurisdiction of the convicting court. See *ibid.* The concept of "jurisdictional" error was stretched to more and more constitutional claims until all constitutional claims were included, and the pretense of jurisdiction was dropped. See *id.*, at 932-933. At no time, however, did the *de novo* relitigation rule stretch to the full limit of the jurisdiction to encompass all statutory and treaty-based claims.

In *Sunal* v. *Large*, 332 U. S. 174, 182 (1947), a federal prisoner was denied the right to relitigate a claim, which subsequent developments indicated was meritorious, on the ground that his claim involved neither his constitutional rights nor the jurisdiction of the court. *Hill* v. *United States*, 368 U. S. 424 (1962) held that this distinction in claims continued after enactment of 28 U. S. C. § 2255, which was intended as a procedural substitute for habeas without changing the substantive criteria of review. See *id.*, at 427-428. The violation of Federal Rules of Criminal Procedure claimed by Hill "is not itself an error of the character or magnitude cognizable under a writ of habeas corpus. It is an error which is neither jurisdictional nor constitutional. It is not a fundamental defect which inherently results in a complete miscarriage of justice . . . ." *Id.*, at 428; see also *United States v. Timmreck*, 441 U. S. 780, 783 (1979).

Not until *Reed* v. *Farley*, 512 U. S. 339 (1994) did this Court address whether the *Hill* rule applied to state prisoners. Such questions rarely arise, because so few federal statutes and even fewer self-executing treaties regulate state criminal procedure. The statute forbidding racial discrimination in jury selection, 18 U. S. C. § 243, is one of the few, but it is difficult to see how one could violate this statute without also violating the Equal Protection Clause as it is presently understood. See generally *Powers* v. *Ohio*, 499 U. S. 400, 408 (1991).

Reed involved the Interstate Agreement on Detainers (IAD), an interstate compact that is both federal and state law. See 512 U. S., at 341, 347. The Indiana Supreme Court considered and rejected Reed's IAD claim. See *id.*, at 345. The Court rejected his argument that the *Hill* rule should be limited to federal prisoners. "[O]ur decisions assume that *Hill* controls collateral review–under both §§ 2254 and 2255–when a federal statute, but not the Constitution, is the basis for the postconviction attack." *Id.*, at 353-354.[7] The IAD claim did not go to a fundamental defect, at least as presented in this case. *Id.*, at 349 (plurality).[8] The "fundamental defect" exception to *Hill*'s prohibition of relitigation of nonconstitutional rules may be entirely superfluous. In today's expansive view of constitutional criminal procedure, it is hard to imagine a claim that would meet *Hill*'s test that did not also state a claim under the Due Process Clause. See *id.*, at 357 (Scalia, J., concurring in part and concurring in the judgment).

"By the Constitution a Treaty is placed on the same footing, and made of like obligation, with an act of legislation." *Whitney* v. *Robertson*, 124 U. S. 190, 194 (1888). *Reed* is therefore on point. Where a state court has duly considered the treaty claim and rendered a decision on it, reconsideration of that decision is not available on federal habeas corpus. A different rule might apply if the state courts simply refuse to abide by the United States's treaty obligations as construed by this Court, see *Reed*, 512 U. S., at 355 (plurality), but that is not what happened in this case. By considering and deciding the merits as well as procedural default, the state court satisfied the obligation of review in advance of the *Avena* decision. No further review in federal court is required by *Avena*, and no such review is permitted under *Reed*.

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[7] The dissent relied primarily on the lack of any distinction between constitutional and nonconstitutional claims in the language of the statute. See *id.*, at 365 (opinion of Blackmun, J.). This is no longer entirely true. As explained in Part IV-A, above, Congress expressly distinguished constitutional from nonconstitutional claims in the context of petitioner's appeals, and it probably had the *Reed* rule in mind when it did so.

[8] Justice Ginsburg's opinion is the opinion of the Court except for Part II and the last paragraph of Part IV. As to those parts it is a plurality, but it is the opinion concurring on the "narrowest grounds." See *Marks* v. *United States*, 430 U. S. 188, 193 (1977).

CONCLUSION

The decision of the United States Court of Appeals for the Fifth Circuit denying a certificate of appealability should be affirmed.

February, 2005

Respectfully submitted,

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In The Supreme Court of the United States

JOSE ERNESTO MEDELLIN,

Petitioner,

v.

DOUG DRETKE, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF AMICI CURIAE THE EUROPEAN UNION AND MEMBERS OF THE INTERNATIONAL COMMUNITY IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

The European Union (EU) considers the respect for treaty based rights to be of vital importance both nationally and within the international community. This principle is common to its twenty-five Member States: Austria, Belgium, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden, and the United Kingdom. Like the United States, all EU Member States are party to the Vienna Convention on Consular Relations (VCCR).[2] Article 36 of the VCCR (Article 36) confers both individual and State rights. As such, the EU has an interest in securing compliance with rights guaranteed under Article 36. This position has been expressed to the Government of the United States through specific démarches in cases involving individual foreign nationals who have been deprived of their rights under Article 36.[3]

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[1] In accordance with Supreme Court Rule 37.6, *amici* represent that no party other than *amici* and counsel for *amici* authored this brief in whole or in part, and no person or entity, other than *amici* and counsel, have made a monetary contribution to the preparation or submission of this brief. Consent letters from both Petitioner and Respondent have been filed with the Clerk of the Court. Counsel acknowledge the valuable coordination and research for this project from Anne James, Executive Director and Joanne Cecil, Project Assistant, International Justice Project.

[2] *Opened for signature* Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261.

[3] Demarches in the cases of foreign nationals were transmitted in each of the following: Javier Suarez Medina, Texas (Mexican), 23 July, 2002; Hung Thanh Le, Oklahoma (Vietnamese), 4 December, 2003; Gerardo Valdez, Oklahoma (Mexican), 13 July, 2001; Osvaldo Torres, Oklahoma (Mexican) 30 April, 2004. All these communications can be found on the Internet, *EU Policy and Action on the Death Penalty, at* http://www.eurunion.org/legislat/DeathPenalty/deathpenhome.htm#ActionUSDeathRowCases. See, also European Union, *Guidelines to EU*

As nations committed to the rule of law, the Member States of the EU have a fundamental interest in compliance with international instruments, particularly when the rights of a Member State's national may be in the balance.

The EU believes that it can provide this Court with a special and unique perspective that is not available through the views of the parties.

The Council of Europe,[4] Iceland, Liechtenstein, Norway and Switzerland have explicitly expressed to the European Union and its Member States their shared interest as *amici* and their support for the arguments put forward in the present brief.

The positions taken in the following arguments, while expressed as those of the European Union, are shared by all signatories to the brief.

SUMMARY OF ARGUMENT

Article 36 confers on detained foreign nationals a right to be informed, without delay, by the arresting authority, of the right to contact consular officers of the Sending State. The right to be so informed is an individual right (as well as a right accorded to the Sending State). If the foreign national is convicted without being informed of the rights under Article 36, that individual must be allowed to apply to a court in order to challenge the conviction and sentence by claiming, in reliance on Article 36 (1), that the competent authorities failed to comply with their obligations to provide the requisite consular information.

Courts must conduct such a review even if their procedural rules, such as those relating to default of claims, would otherwise preclude review. These propositions have been affirmed by the International Court of Justice (ICJ).[5] Furthermore, the right to consular access is a right protected under customary international law and must therefore be observed.

ARGUMENT

I. THE VIENNA CONVENTION ON CONSULAR RELATIONS IS A KEY FORM OF PROTECTION FOR FOREIGN NATIONALS

The VCCR, a product of the Conference on Consular Relations convened by the United Nations General Assembly in 1963, is a global multilateral treaty that governs consular relations and regulates many aspects of the relationship of foreign consuls to a host Government. The VCCR has been ratified by 165 States (including the United States on November 24, 1969) and is the cornerstone of international consular relations.[6] Its conclusion is regarded as "the single

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Policy Towards Third Countries on the Death Penalty (June 3, 1998), Part III(v) *at* http://www.eurunion.org/legislat/DeathPenalty/Guidelines.htm.

[4] The Council of Europe is composed of 46 Member States: Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia & Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Monaco, Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, San Marino, Serbia and Montenegro, Slovakia, Slovenia, Spain, Sweden, Switzerland, The Former Yugoslav Republic of Macedonia, Turkey, Ukraine, and the United Kingdom.

[5] *LaGrand (F.R.G. v. U.S)*, 2001 I.C.J 104 (Jun. 27); *Avena and other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 128 (Mar. 31).

[6] United Nations, *Multilateral Treaties Deposited with the Secretary-*

most important event in the history of the consular institution. Indeed, after 1963, there can be no settlement of consular disputes or regulation of consular relations, whether by treaty or national legislation, without reference or recourse to the Vienna Convention".[7]

The Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes (Optional Protocol) provides that disputes "arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice".[8]

The ICJ is "the principal judicial organ of the United Nations" (U.N.).[9] The Court's statute is annexed to the U.N. Charter; therefore, States which become members of the United Nations also become parties to the Statute.[10]

The United States[11] and Member States of the EU are party to the United Nations Charter. Respect for ICJ judgments by

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General, Vienna Convention on Consular Relations, at, http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIII/treaty31.asp.

[7] LUKE LEE, CONSULAR LAW AND PRACTICE at 26 (2d. ed. 1991).

[8] Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, *opened for signature* Apr. 24, 1963, 21 U.S.T. 325, 596 U.N.T.S. 261.

[9] U.N. Charter, *opened for signature* June 26, 1945, 59 Stat. 1031, T.S. No. 993, Article 92; Statute of the International Court of Justice, 59 Stat. 1055, T.S. No. 993.

[10] U.N. Charter, Article 93, para.1.

[11] The United States ratified the U.N. Charter on August 8, 1945. United Nations, *Multilateral Treaties Deposited with the Secretary General, Charter of the United Nations, at,* http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterI/treaty1.asp

States that are party to litigation is a basic principle of the international legal order as articulated in the United Nations Charter, Article 94: "Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party".

Article 36 recognizes the rights of consuls to communicate with and assist their nationals. Article 36 also confers specific rights on detained or imprisoned foreign nationals. As the United States Government has noted before the International Court of Justice, Article 36 "establishes rights not only for the consular officer, but perhaps more importantly for the nationals of the Sending State who are assured access to consular officers and through them to others."[12]

Article 36 requires a Receiving State to inform detained foreign nationals of their right to communicate with their consulate and to facilitate access between detained foreign nationals and consuls of the Sending State. In addition, Article 36 confers specific State rights, recognizing the right of consuls to have access to, communicate with, and assist their detained national. Further, it establishes an obligation upon the Receiving State under paragraph 1 (c) of Article 36 to enable the consular officers to arrange for legal representation of their nationals.

The significance of consular access has been expounded upon by the Inter-American Court of Human Rights (IACtHR). The IACtHR stated that "notification of the right to communicate with a consular official of his country will materially improve his possibilities of a defense," and "procedural measures, including those taken by the police, will be done with greater concern for legality and greater respect for the dignity of the person."[13] The IACtHR stated that the right to be informed of the right to consular access "is a means of defense for the accused that is reflected, on occasion in a determinative way, in the respect shown for his other procedural rights".[14]

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[12] U.S. Diplomatic and Consular Staff in Tehran (*USA v. Iran*), ICJ Pleadings, at 174.

EU Member States consider consular access to be of critical importance. A foreign national faces unique disadvantages when left to navigate the foreign country's legal system in the absence of support from his home nation, even if he is represented by competent legal counsel. Article 36 reflects agreement among the States parties that foreign nationals require special assistance when they are detained on a criminal charge.

Participation by a consul provides greater assurance that a Sending State's national will understand the rights afforded by the law of the Receiving State, and correspondingly that the proceedings will be conducted as intended under the law of the Receiving State.

In a particular case, a consul may be able to assure that the accused is represented by a competent attorney who possesses a cultural understanding of the national's specific circumstances and background. Consuls may also be able to acquaint their nationals with the basic procedures under the local legal system.

Accurate translation may also be of importance. A consul may be able to assist in securing expert translation, the result

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[13] *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, para. 121, Advisory Opinion OC-16/99, Inter-American Court of Human Rights (1999).

[14] *Id.* para 123.

of which could provide both an effective understanding by the national of his legal rights and the assurance for the arresting authority of a thorough and accurate comprehension of the national's statements.

A consul may assist in locating witnesses or documentary evidence available in the Sending State. The information thus gained may be critical in a determination of guilt, and, in the event of a conviction, in the assignment of an appropriate sentence. Consular protection is particularly important in capital cases, in which the question of life or death may be impacted by evidence of, for example, the national's health history, educational and social history, or history of public service.

II. ARTICLE 36 PROVIDES JUDICIALLY ENFORCEABLE RIGHTS

This Court has provisionally accepted in *Breard v. Greene*[15] that the VCCR confers on a foreign national a right to consular assistance following arrest. The ICJ in *LaGrand (F.R.G. v. U.S.)*, stated that Article 36 provides a right invocable by the foreign national. Article 36 provides, in part: "The said authorities shall inform the person concerned without delay of his rights under this subparagraph." The ICJ confirmed that Article 36 creates a right for a foreign national both because of this plain language, and "[m]oreover, under Article 36, paragraph 1 (c), the sending State's right to provide consular assistance to the detained person may not be exercised 'if he expressly opposed such action.' The clarity of these provisions, viewed in their context, admits of no doubt."[16]

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[15] *Breard v. Greene*, 523 U.S. 371, 376 (1998).

[16] *LaGrand (F.R.G. v U.S.)*, 2001 I.C.J. 104 (Jun. 27), para 77.

III. JUDICIAL REVIEW OF CONVICTION AND SENTENCE IS REQUIRED IF ARTICLE 36 IS VIOLATED

If a foreign national is convicted absent compliance with the notification obligation of Article 36, the rights of both the Sending State and the foreign national are implicated, and the conviction must be reviewed. Article 36 provides in a second paragraph: "The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended".[17]

The ICJ has addressed required remedies, first in *LaGrand* in 2001, and more recently, on March 31, 2004, in *Avena and other Mexican Nationals*.[18] In Article 36, paragraph 2, the ICJ found an obligation to allow a foreign national to seek a remedy: "The Court cannot accept the argument of the United States which proceeds, in part, on the assumption that paragraph 2 of Article 36 applies only to the rights of the sending State and not also to those of the detained individual".[19]

The ICJ held that where the notification obligation under Article 36 has not been observed, action on the criminal conviction is required: "if the United States . . . should fail in its obligation of consular notification to the detriment of German nationals, an apology would not suffice in cases

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[17] VCCR, Article 36, para. 2.

[18] *Avena and other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 128 (Mar. 31).

[19] LaGrand, para. 89.

where the individuals concerned have been subjected to prolonged detention or convicted and sentenced to severe penalties. In the case of such a conviction and sentence, it would be incumbent upon the United States to allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in the Convention".[20]

The ICJ subsequently affirmed in *Avena*, the requirement for review and reconsideration of a breach of Article 36 rights. The Court considered "that it is the judicial process that is suited to this task". [21] Contrary to the argument of the US, the Court stated that consideration by way of executive clemency does not suffice in view of the fact that the clemency process, as currently practiced in the US, does not appear to meet the requirements and it is therefore not sufficient in itself to serve as an appropriate means of "review and reconsideration".[22]

IV. REVIEW MUST TAKE ACCOUNT OF THE VIOLATION

Review and reconsideration is required even absent a showing that a different result would have been achieved had a consul intervened. As indicated above, a consul may act in a variety of ways in a particular case. After a person has been convicted without being informed of the right of consular access, it may be impossible to determine what impact a consul might have had on the proceedings.

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[20] *Id.* para. 125.

[21] *Id.* para. 141.

[22] *Avena*, para. 143.

Article 36, by requiring consular access, presumes that it will help a foreign national. The ICJ stated in *Avena*, "The question of whether the violations of Article 36, paragraph 1, are to be regarded as having, in the causal sequence of events, ultimately led to convictions and severe penalties is an integral part of criminal proceedings before the courts of the United States and is for them to determine in the process of review and reconsideration. In so doing, it is for the courts of the United States to examine the facts, and in particular the prejudice and its causes, taking account of the violation of the rights set forth in the Convention".[23]

V. RULES ON DEFAULT MAY NOT BE APPLIED

The ICJ ruled that treaty obligations require that rights be enforced at whatever point in time it remains possible to do so, regardless of rules on procedural default. "The problem arises," the ICJ stated, "when the procedural default rule does not allow the detained individual to challenge a conviction and sentence by claiming, in reliance on Article 36, paragraph 1, of the Convention, that the competent national authorities failed to comply with their obligation to provide the requisite consular information 'without delay,' thus preventing the person from seeking and obtaining consular assistance from the Sending State".[24] The ICJ concluded on the facts of the *LaGrand* case, "Under these circumstances, the procedural default rule had the effect of preventing 'full effect [from being] given to the purposes for which the rights accorded under this article are intended,' and thus violated paragraph 2 of Article 36".[25]

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[23] *Avena* para. 122.

[24] *LaGrand*, para. 90.

[25] *Id.* para. 91.

Expanding upon this position, the ICJ in *Avena* asserted that "[t]he crucial point in this situation is that, by the operation of the procedural default rule as it is applied at present, the defendant is effectively barred from raising the issue of the violation of his rights under Article 36 of the Vienna Convention and is limited to seeking the vindication of his rights under the United States Constitution".[26]

VI. CONSULAR ACCESS IS A RIGHT UNDER CUSTOMARY INTERNATIONAL LAW

The rights of a foreign national as provided in Article 36 are part of the corpus of customary international law. Indeed, the United States accepts that consular access is required by a customary norm and it "looks to customary international law as a basis for insisting upon adherence to the right of consular notification, even in the case of countries not party to the VCCR or any relevant bilateral agreement." Consular notification is, in the view of the United States, "a universally accepted, basic obligation…"[27]

In addition to the widespread ratification of the VCCR, the customary character of the consular access right is evidenced by its inclusion in other international instruments. International norms and standards adopted by international bodies and organizations, including the United Nations, further reflect acceptance of the necessity for full respect and observance of the right to consular access.

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[26] *Avena*, para. 134.

[27] DEPARTMENT OF STATE, CONSULAR NOTIFICATION AND ACCESS, at 44 (1998).

While the VCCR is the foundational treaty that regulates consular relations, additional treaties, including a number ratified by the United States, incorporate the principle. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment requires States to punish those who commit torture. A torture suspect who is a foreign national, "shall be assisted in communicating immediately with the nearest appropriate representative of the State of which he is a national".[28]

Furthermore, a foreign national charged with a crime against a diplomat is entitled, by virtue of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents, to consular access.[29]

Since 2000, the Organization of American States General Assembly has also enshrined these principles in the resolution on *The Human Rights Of All Migrant Workers And Their Families.*[30]

Various U.N. bodies have further confirmed this fundamental principle. The U.N. General Assembly has affirmed the right to consular access in a number of resolutions. The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment states that a foreign national is entitled to consular access, and to be informed of that right.[31] In addition, the Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live views consular access as a right in the event of a detention.[32]

The U.N. General Assembly has "reaffirm[ed] emphatically the duty of States parties to the Vienna Convention on Consular Relations of 1963 to ensure full respect for and observance of the Convention, in particular with regard to the right of foreign nationals, regardless of their immigration status, to communicate with a consular official of their own State in the case of detention, and the obligation of the State in whose territory the detention occurs to inform the foreign national of that right".[33]

Both the U.N. Rules for the Protection of Juveniles Deprived of their Liberty[34] and the U.N. Standard Minimum Rules for the Treatment of Prisoners[35] which provides that if a foreign national is arrested, the right of consular access must be respected.

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[28] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 6 (3), G.A. Res. 39/46, [annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984)], *entered into force* June 26, 1987.

[29] Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Article 6, 28 U.S. Treaties 1977 (1973).

[30] *The Human Rights Of All Migrant Workers And Their Families*, AG/RES. 1717 (XXX-O/00) (Resolution adopted at the first plenary session, held on June 5, 2000); *The Human Rights Of All Migrant Workers And Their Families*, AG/RES. 1775 (XXXI-O/01) (Resolution adopted at the third plenary session, held on June 5, 2001); *The Human Rights Of All Migrant Workers And Their Families*, AG/RES. 1898 (XXXII-O/02) (Resolution adopted at the fourth plenary session held on June 4, 2002); *The Human Rights Of All Migrant Workers And Their Families*, AG/RES. 1928 (XXXIII-O/03), (Resolution adopted at the fourth plenary session, held on June 10, 2003); *The Human Rights Of All Migrant Workers And Their Families*, AG/RES. 2027 (XXXIV-O/04), (Resolution adopted at the fourth plenary session, held on June 8, 2004).

[31] Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 16, U.N. General Assembly Resolution 43/173 (1988).

[32] Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live, Article 10, U.N. General Assembly Resolution 40/144 (1985).

[33] Protection of Migrants, U.N. General Assembly Resolution, A/RES/58/190 (Mar. 22, 2004), para. 10.

[34] G.A. res. 45/113, annex, 45 U.N. GAOR Supp. (No. 49A) at 205, U.N. Doc. A/45/49 (1990).

[35] Standard Minimum Rules for the Treatment of Prisoners, adopted Aug.

Since 1999, the U.N. Commission on Human Rights has annually requested States that maintain the death penalty to adhere to the principles of consular access.[36] Most recently, in 2004, the Commission urged States to "comply fully with their international obligations, in particular with those under article 36 of the 1963 Vienna Convention on Consular Relations particularly the right to receive information on consular assistance within the context of a legal procedure, as affirmed by the jurisprudence of the International Court of Justice and confirmed in recent relevant judgments…"[37]

Since 1982, the U.N. Commission on Human Rights has appointed a Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, whose mandate has included review of those countries which still apply the death penalty. After a special mission to the United States, the only one conducted in this country, the Special Rapporteur concluded

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30, 1955, by the First U.N. Congress on the Prevention of Crime and the Treatment of Offenders, U.N. Doc. A/CONF/611, annex I, E.S.C. res. 663C, 24 U.N. ESCOR Supp. (No. 1) at 11, U.N. Doc. E/3048 (1957).

[36] U.N. Commission on Human Rights, *The Question of the Death Penalty*, 55th Sess. Resolution 1999/61, U.N. Doc. E/CN.4/RES/1999/61 (1999); U.N. Commission on Human Rights, *The Question of the Death Penalty*, 56th Sess. Resolution 2000/65, U.N. Doc. E/CN.4/RES/2000/65 (2000); U.N. Commission on Human Rights, *The Question of the Death Penalty*, 57th Sess. Resolution 2001/68, U.N. Doc. E/CN.4/RES/2001/68 (2001); U.N. Commission on Human Rights, *The Question of the Death Penalty*, 58th Sess. Resolution 2002/77, U.N. Doc. E/CN.4/RES/2002/77 (2002); U.N. Commission on Human Rights, *The Question of the Death Penalty*, 59th Sess. Resolution 2003/67, U.N. Doc. E/CN.4/RES/2003/67 (2003); U.N. Commission on Human Rights, *The Question of the Death Penalty*, 60th Sess. Resolution 2004/67, U.N. Doc. E/CN.4/RES/2004/67 (2004).

[37] *The Question of the Death Penalty*, 60th Sess., U.N. Doc. E/CN.4/RES/2004/67 (Apr. 21, 2004), para. 4(h).

"that not informing the defendant of the right to contact his/her consulate for assistance may curtail the right to an adequate defence, as provided for by the ICCPR".[38]

VII. CONCLUSION

The EU considers the implementation of the right of consular access to be of utmost importance to members of the international community. Article 36, as construed by the ICJ, requires the review and reconsideration of the conviction and sentence in the present case. When notification is omitted and a criminal conviction ensues, courts must provide a remedy. As the ICJ stated in *Avena*, "the remedy to make good these violations should consist in an obligation on the United States to permit review and reconsideration of these nationals' cases by the United States courts."[39]

In light of the international law norms articulated above, the EU, Council of Europe, Iceland, Liechtenstein, Norway and Switzerland respectfully support the position of Petitioner.

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[38] U.N. Commission on Human Rights, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, E/CN.4/1998/68/Add.3 (1998), para. 121.

[39] *Avena*, para. 121.

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APPENDIX

STATEMENT OF INTEREST THE COUNCIL OF EUROPE

The Council of Europe, an international organization composed of 46 European states committed to the rule of law and respect for human rights, associates itself with the amicus curiae brief submitted by the European Union in support of Mr. Jose Medellin's petition before the Supreme Court.

It is of the opinion that the right of detained foreign nationals to be informed, without delay, of the right to consular access, as set out in Article 36 of the Vienna Convention on Consular Relations, is an individual right and one which is also protected under customary international law. If a foreign national is convicted without being informed of this right, that individual must be allowed to apply to a court to challenge the conviction and the sentence, in reliance on Article 36 (1). Courts must conduct such a review even if their procedural rules would otherwise preclude review.

Furthermore, it is of the opinion that respect for judgments of the International Court of Justice by States that are party to litigation is a basic requirement of the rule of law at the international level, as expressed in Article 94 of the United Nations Charter.

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No. 04-5928

IN THE

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JOSE ERNESTO MEDELLIN,
Petitioner,
v.
DOUG DRETKE, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF FOREIGN SOVEREIGNS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER JOSE ERNESTO MEDELLIN

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INTEREST OF AMICI CURIAE[1]

The United States is a party to the Vienna Convention on Consular Relations[2] and the Convention's Optional Protocol Concerning the Compulsory Settlement of Disputes.[3] Article 36 of the Convention requires authorities who detain a foreign national to notify the detained person without delay of the right to contact consular officials and requires the authorities, if requested, to notify consular officials of the detention. The Optional Protocol grants enforcement powers to the International Court of Justice ("ICJ") and makes it the compulsory forum for resolving disputes on matters related to the Convention between nations that have adopted the Optional Protocol.

Texas authorities arrested, tried, convicted, and sentenced 18-year-old Jose Ernesto Medellin without ever providing him the notice required by Article 36, even though Medellin told those authorities, when they first arrested him, that he was born in Mexico. Mexico commenced the *Case Concerning Avena and Other Mexican Nationals* (*Mexico v. U.S.*) (Order of March 31, 2004), *available at* http://www.icj-cij.org/ [hereinafter "*Avena*"], to seek redress for the Texas authorities' actions in Medellin's case and for various U.S. state authorities' similar failures to notify Mexican nationals about their rights in 53 other capital cases. The ICJ ruled that Texas authorities violated Article 36 in Medellin's case by not notifying him about the right to speak with a consul once they had reason to believe he was a Mexican national. In Medellin's case, as in the 50 other instances where it found Article 36 violations, the ICJ ordered U.S. courts to review his conviction to determine, without regard to procedural default doctrines, the violation's effect on the proceedings that led to his death sentence.[4] The Court of Appeals held that its prior decisions and decisions of this Court precluded it from following the ICJ's holding in *Avena*. Now, Medellin asks this Court to determine whether U.S. courts must follow *Avena*.

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[1] No counsel for a party authored this brief in whole or in part. No person or entity other than *amici* or their counsel has made a monetary contribution to the preparation or submission of this brief. Counsel for Petitioner and Respondent have consented in writing to the filing of this brief *amicus curiae.*

[2] April 24, 1963, 21 U.S.T. 77 [hereinafter "Vienna Convention" or the "Convention"].

[3] April 24, 1963, 21 U.S.T. 325 [hereinafter "Optional Protocol"].

Amici nations have an immediate interest in Medellin's case. Each *amicus* has adopted the Convention and each has a vital interest in seeing that U.S. law-enforcement authorities comply with the Convention and furnish a legal remedy for treaty violations. *Amici* have thousands of their nationals present in the United States and must ensure that those nationals receive the consular protection and support envisaged by Article 36. *Amici*, through their consuls in the United States, rely on the notice provisions in Article 36 to ensure that *amici* can provide speedy and effective assistance when federal, state, or local authorities detain one of their nationals. Without notice under Article 36, detained nationals often lose the benefit of consular assistance in criminal proceedings.

When U.S. authorities violate the Convention, *amici* have a further interest in seeing that U.S. courts apply a remedy that restores the benefits of Article 36, because consular intervention can affect the outcome of criminal proceedings. Consuls have an obligation to assist and ensure fair treatment of their nationals who become entangled in another state's criminal-justice system. In death-penalty cases, consuls can assist in obtaining mitigating evidence from the home country; the accused might otherwise lack access to such evidence. Several *amici* have nationals on death row in the United States.[5] Because of the death penalty's severity, these *amici* have a particular interest in ensuring that nationals on death row receive redress for any prejudicial effect that a treaty violation had on their defense.

More generally, *amici* nations have an interest in reciprocal compliance with international obligations. This includes abiding by the ICJ's judgments if a country has agreed by treaty to do so. In this case, the United States signed the Optional Protocol, which requires compliance with the ICJ's judgment in *Avena*. The ICJ can function effectively as a forum for peacefully resolving disputes only if *all nations* abide by its judgments in cases where they have a treaty-based obligation to comply. The reciprocity principle applies equally to the consular system codified in the Vienna Convention. In the long term, countries will not provide foreign nationals with consular notice under the Convention if the same protection is not accorded to their own citizens abroad.

INTRODUCTION AND SUMMARY OF ARGUMENT

In the past, the United States has formally protested detention of its nationals without consular notice, even when the detention lasted for only 32 hours.[6] Then as now, the United States recognized that a consul may provide critical assistance to nationals detained in another country's criminal-justice system. Vienna Convention Article 36 makes that assistance possible by requiring that local authorities notify the detained person of the right to speak with a consul. Such notice can affect the outcome of criminal proceedings. Consular assistance may take many forms, including helping to select counsel, urging prosecuting authorities to seek a reduced penalty, collecting evidence (including substantial mitigating evidence) from the home country, and monitoring proceedings.

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[4] In *Avena*, the Mexican government sought relief for 54 nationals convicted in capital cases. The ICJ held that authorities in the United States violated Article 36 in 51 of those cases. *Avena*, ¶¶ 106(1)-(2); 153(4).

[5] The Death Penalty Information Center lists on its website each country that has a national on a U.S. death row and the total number of nationals on death row for each of those countries. Death Penalty Information Center, *Foreign Nationals and the Death Penalty in the United States* (last modified July 15, 2004), *at* http://www.deathpenaltyinfo.org/.

[6] *See* LUKE T. LEE, CONSULAR LAW AND PRACTICE 145-49 (2d ed. 1991) [hereinafter "CONSULAR LAW"].

This Court should reverse the Court of Appeals' judgment and remand the case for further review in accordance with the *Avena* judgment for several reasons. First, the pattern of treaty violations by local authorities in the United States, which deprives foreign defendants of consular assistance, establishes a dangerous precedent, because Article 36's vitality worldwide depends on reciprocity. If jurisdictions in the United States continue to deny detained foreign nationals notice under Article 36, and if U.S. courts fail to provide a remedy for that denial, other nations may follow suit. As the United States Department of State has recognized in its guidelines to local authorities, vigorous domestic adherence to Article 36 helps guarantee that U.S. nationals will receive the same treatment abroad. The United States insists on consular notice for its citizens when authorities in other countries detain them, and it has protested denial of, or minor delays in, consular access or notice.

Second, the ICJ's *Avena* judgment now requires U.S. courts to consider the effect of the treaty violation—denying the consular notification the United States insists upon for its own citizens—in Medellin's case. The proceedings that resulted in the *Avena* judgment took place under the Optional Protocol, which selects the ICJ as the compulsory forum for resolving disputes between states that have adopted the Protocol, as both the United States and Mexico have. The Protocol's plain language requires adherence to the ICJ's judgment.

Third, the United States should adhere to the ICJ judgment for another reason: the United States uses the ICJ to air international grievances. The United States has commenced ten cases before the ICJ.[7] Most significantly, after the takeover of its Tehran embassy in 1979, the United States commenced the first action ever to invoke the ICJ's compulsory jurisdiction under the Optional Protocol. In that case, the United States obtained a favorable judgment ordering Iranian compliance with the Vienna Convention. *United States Diplomatic and Consular Staff in Tehran* (*U.S. v. Iran*) (May 24), 1980 I.C.J. 3, ¶ 95 (emphasis added) [hereinafter "*Diplomatic and Consular Staff*"]. When Iran failed to comply with the judgment, the United States condemned Iran's "contempt" of the ICJ.[8] Adherence to the rule of law requires U.S. compliance with the Vienna Convention and *Avena*.

ARGUMENT

I. THE VIENNA CONVENTION AFFORDS VITAL PROTECTION TO INDIVIDUALS, INCLUDING U.S. CITIZENS, WHO TRAVEL OR RESIDE OUTSIDE THEIR HOME COUNTRY.

Although consular relations have existed since ancient times, the Vienna Convention provided the first multilateral codification of a consular system. Member states established the Convention to "contribute to the development of friendly relations among nations, irrespective of their differing constitutional and social systems." Vienna Convention, Preamble. The United States Senate unanimously ratified the Vienna Convention and the Optional Protocol on October 22, 1969. 115 Cong. Rec. S30, 953, S30, 997 (daily ed. Oct. 22, 1969). The hearings on ratifying the Convention record the

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[7] *See* http://www.icj-cij.org/icjwww/idecisions.htm.

[8] *Muskie Issues a Plea on Hostages*, THE NEW YORK TIMES, Aug. 30, 1980, at A3.

Senate's understanding that the Convention would preempt any conflicting state or federal laws. *See* William J. Aceves, *The Vienna Convention On Consular Relations: A Study Of Rights, Wrongs, And Remedies*, 31 VAND. J. TRANSNAT'L L. 257, 267-68 (1998). J. Edward Lyerly, the Deputy Legal Advisor for the Nixon Administration, testified before the Foreign Relations Committee that "'to the extent that there are conflicts in Federal legislation or state laws[,] the Vienna Convention, after ratification, would govern. . . .'" *Id.* at 268.

A. The Convention, including Article 36, codifies the consular system on which member nations rely to ensure their citizens' fair treatment when abroad.

The ICJ described consular relations' importance in its interim order in the Iran hostage-taking case:

> [T]he unimpeded conduct of consular relations, which have also been established between peoples since ancient times, is no less important in the context of present-day international law, in promoting the development of friendly relations among nations, and *ensuring the protection and assistance for aliens resident in the territories of other states.*

Diplomatic and Consular Staff, ¶ 40 (emphasis added). Article 5(e) of the Convention lists numerous consular functions and includes within that list the functions most pertinent to this case: "helping and assisting nationals, both individuals and bodies corporate, of the sending state."

To that end, the Convention recognizes the importance of consular communication in situations where authorities in one member country detain a national of another member country. In that event, Article 36(1) requires the detaining authorities to take each of the following steps: (1) permit communication between a consul and a detained national; (2) notify a detained person "without delay" of his or her right to speak with a consul; and (3) upon request, notify the consul of the national's detention. The State Department has recognized on multiple occasions that notification serves an "essential" function in protecting nationals who travel to foreign countries. 7 FOREIGN AFFAIRS MANUAL § 411 (1984).[9]

> [O]ne of the basic functions of a consular officer is to provide a "cultural bridge" between the host community and the officer's own compatriots traveling or residing abroad. No one needs a cultural bridge more than the individual U.S. citizen who has been arrested in a foreign country or imprisoned in a foreign jail.

Id., § 401; *see* 7 FOREIGN AFFAIRS MANUAL § 410 (2004).[10] Article 36 exists to ensure that consular officials will have a real, not merely hypothetical, opportunity to act as a "cultural bridge" for their nationals. Detained individuals unschooled in foreign affairs matters often would not know to request communication with their consul. The Convention thus obligates states to notify persons of that right.

B. With proper notice, a consul can provide a detained national a wide array of assistance that can affect—and actually has affected—the outcome of criminal proceedings.

"Detained foreign nationals are inevitably distressed by the prospect of securing and preserving their rights in a legal system with whose institutions and rules they are not familiar." CONSULAR LAW at 145 (quoting U.S. DEP'T. OF STATE, TELEGRAM 40298 TO EMBASSY DAMASCUS, Feb. 21, 1975). "To minimize the disadvantages experienced by accused foreigners, international law guarantees the right of consular access." S. A. Shank & J. Quigley, *Foreigners on*

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[9] *Available at* http://web.archive.org/web/20040301104701/foia.state.gov/REGS/fams.asp? level=2&id=8&fam=0.

[10] *Available at* http://foia.state.gov/REGS/fams.asp?level=2&id=8&fam=0.

Texas's Death Row and the Right of Access to Consul, 26 ST. MARY'S L.J. 719, 721 (1995). The Foreign Affairs Manual—the State Department's own instructions to United States consular officers—recognizes the consul's role in helping a detainee understand the unfamiliar criminal-justice system that he or she must navigate. 7 FOREIGN AFFAIRS MANUAL §§ 400-426.2-1 (2004).

Consular assistance in navigating a foreign judicial system may take many forms. First, consular officials can help the detained national in selecting counsel, and in some cases, may even recruit pro bono counsel. The United States, Mexico, and the United Kingdom have specific guidelines for their consuls to assist nationals in obtaining counsel. CONSULAR LAW, at 125, 127 & 166. These published instructions typify the practices followed by many nations. In one case, Mexican consular officials in Houston helped secure *pro bono* representation after trial from the firm Vinson & Elkins for Ricardo Aldape, a Mexican national sentenced to death in Texas. The firm's efforts exposed intimidation and manipulation of witnesses "calculated to obtain a conviction" despite "the lack of evidence pointing to [Aldape's]" guilt. *Note: Reciprocity Unmasked: The Role of the Mexican Government in Defense of Its Foreign Nationals in United States Death Penalty Cases*, 20 ARIZ. J. INT'L & COMP. LAW 359, 372 (2003) (quoting *Guerra v. Collins*, 916 F. Supp. 2d 620, 637-38 (S.D. Tex. 1995)) [hereinafter "*Reciprocity Unmasked*"]. Aldape prevailed in habeas corpus proceedings, and prosecutors decided not to try him again, so he was released and returned to Mexico. "[T]he attorney that handled the case noted that 'without the Mexican consul's involvement, I have no doubt that [Aldape] would never have been released.'" *Id.* at 373-74. The Mexican government also participated extensively in the case of Osbaldo Torres, one of the individuals covered by the *Avena* judgment. As discussed in Medellin's Petition, the Oklahoma Court of Criminal Appeals stayed Torres's execution and remanded the case for an evidentiary hearing to determine the Article 36 violation's effect in that case. Pet. at 25-26 and Pet. App., at 142A-163A. The Mexican government took many actions to assist Torres: Mexico's ambassador to the United States spoke at Torres's clemency hearing, Mexico filed an *amicus* brief in the Oklahoma Court of Criminal Appeals, and Mexican President Vicente Fox personally urged Oklahoma Governor Brad Henry to delay the execution.[11] Governor Henry ultimately commuted Torres's sentence to life in prison.[12]

Second, prior to trial, consular officials may address the prosecuting authorities regarding the case. In capital cases, this may include presenting reasons for the prosecutor not to seek the death penalty, such as mitigating evidence, criminal history (or lack thereof), and the accused's personal circumstances. Missing the chance to present this evidence, which may be located in the home country and thus inaccessible to domestic counsel, significantly increases the foreign national's chance of a death sentence because prosecutors more often than not will decide against seeking the death penalty when faced with substantial mitigating evidence. Shank & Quigley, at 740; *see also McKleskey v. Kemp*, 481 U.S. 279, 307 n.28 (1987) ("[T]he strength of the available evidence . . . may influence a prosecutor's decision to offer a plea bargain or go to trial.").

Third, the consul may help collect evidence for use at trial and, in death-penalty cases, during the penalty phase. Because mitigating evidence may exist in the national's home country rather than in the place of the trial, consuls can provide invaluable assistance in collecting that evidence. *See Reciprocity Unmasked,* at 368 (describing how Mexican officials collected evidence of a defendant's diminished mental capacity from his home town and with that evidence, helped reduce his sentence from death to life in prison); *Note: Strangers in a Strange Land: Assessing the Fate of Foreign Nationals Arrested in the United States by State and Local Authorities*, 78 MINN. L. REV. 771, 772-73 n.6 (1994) (referring to guidelines requiring a Canadian consul "to obtain case related information" on behalf of charged nationals).

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[11] Associated Press, *Death Penalty Opponents Urge Clemency for Torres*, May 12, 2004, *available at* http://ocadp.org/news/2004/torres/opponents_urge.html.

[12] Mexican Secreteriat of Foreign Relations, Press Release No. 106, *Osvaldo Torres' Execution in Oklahoma is Suspended*, *available at* http://www.sre.gob.mx/eua/English/Press/Release/2004/May/SRETorresCourt.pdf.

Fourth, consuls monitor proceedings involving their nationals as a matter of course to ensure fairness and compliance with international standards. Several countries publish specific guidelines for this monitoring. The State Department's guidelines require its consuls to attend any U.S. national's trial, protest any discrimination, and monitor the well-being of incarcerated citizens. CONSULAR LAW, at 169-71 The United Kingdom requires its consuls "to intervene in judicial proceedings" in the event of a "prime-facie miscarriage or denial of justice" or "when appeal to a higher authority would obviously be futile." *Id.* at 125. The potential for discrimination against a foreign national makes consular monitoring particularly important in capital cases. Shank & Quigley, at 741.

Furthermore, consuls can provide assistance beyond the four major categories listed here. For instance, Mexico historically has actively assisted its nationals in U.S. criminal proceedings and in 2000 formed the Mexican Capital Legal Assistance Program. *See Reciprocity Unmasked*, at 393-94. As described above, Mexico's intervention resulted in the outright release of Ricardo Aldape and averted death sentences in three other Mexican nationals' cases. *Id.* at 368-74. None of this vital assistance can occur absent compliance with Article 36 of the Vienna Convention.

II. THE CONTINUED VIABILITY OF ARTICLE 36 DEPENDS ON RECIPROCITY AMONG NATIONS.

This Court long ago recognized that "international law obligations are of necessity reciprocal in nature" and that "what is law for one is, under the same circumstances, law for the other." *United States v. Arjona*, 120 U.S. 479, 487 (1887). International law and United States' foreign-relations law follow the cardinal rule that treaties must be observed (*pacta sunt servanda*). RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §321 cmt. a. "[T]he doctrine of *pacta sunt servanda* . . . lies at the core of the law of international agreements and is perhaps the most important principle of international law." *Id.* "It includes the implication that international obligations survive restrictions imposed by domestic law." *Id.*; U.S. CONST. art. VI, cl. 2 (international treaties preempt conflicting state law under the Supremacy Clause). When one state fails to comply with its treaty obligation, it influences others to do the same. As Justice Brandeis observed, "Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example." *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

A. The United States insists on Article 36's protections for its nationals abroad.

Beginning with the Vienna Convention itself, the United States historically has recognized the importance of Article 36, a position that makes the United States' reciprocal compliance with Article 36 particularly critical. At the Vienna Convention, the U.S. delegation stated that "no country could disregard its obligation in certain circumstances to inform consuls of the sending state of the arrest of its nationals." LUKE T. LEE, VIENNA CONVENTION ON CONSULAR RELATIONS 111 (1966). Indeed, it was the United States, along with several other countries, that sponsored the amendment that ultimately became Article 36. *Id.* at 113. The Unites States has taken the position that Article 36 created "'[o]bligations of the highest order'" that require notification "as quickly as possible and, in any event, no later than the passage of *a few days*." ARTHUR W. ROVINE, DEP'T. OF STATE, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 161 (1973) (emphasis added).

The United States' insistence on consular notice has extended to specific cases involving its nationals in other countries. When the Syrian government detained two American citizens, the State Department chastised it for failing to provide consular notice in accordance with bilateral treaties and customary international law:

> The right of governments, through their consular officials, to be informed promptly of the detention of their nationals in foreign states, and to be allowed prompt access to those nationals, is well established in the practice of civilized nations . . . .

CONSULAR LAW, at 145 (quoting TELEGRAM 40298). The same document emphasized the importance of reciprocity: "The recognition of these rights is prompted in part by considerations of reciprocity. . . . The Government of the Syrian Arab Republic can be confident that if its nationals were detained in the United States the appropriate Syrian officials would be promptly notified and allowed prompt access to these nationals." *Id.*

The State Department also protested the alleged violation of Article 36 by foreign authorities who detained two Americans, even though the authorities released the Americans after 32 hours. The United States considered the principle of complying with Article 36 so important that it actually lodged the protest *after* release, asking a senior minister of the detaining country to "elaborate expeditiously" as to "[w]hy the . . . two United States citizens were not informed of their right to contact the Consulate as provided under [A]rticle 36 of the Vienna Convention on Consular Relations of 1963; and why the Consulate was not officially informed of the detention of two United States Citizens until approximately 28 hours afterward." CONSULAR LAW, at 149. In that instance, the detaining authorities released the individuals in less than two days and gave notice to the U.S. consulate. In contrast to that relatively rapid action, Texas arrested, tried, convicted, and sentenced 18-year-old Medellin to death, and then allowed him to remain on death row during appellate proceedings, without ever notifying the Mexican consulate or telling Medellin that he had the right to contact the consulate. Medellin learned about his right to contact the consulate four years after his arrest, when he was already on death row.

The State Department's actions and statements leave no doubt about the importance that the United States places on rapid consular notification when foreign authorities detain Americans. In fact, the State Department *requires* consular officials to lodge a protest if detaining authorities do not notify the consul within 72 hours. 7 FOREIGN AFFAIRS MANUAL § 426.2-1 (2004). But, as the State Department has also recognized, the United States can expect swift notification only in an environment of reciprocity.

B. Texas's treaty violation has international repercussions.

Texas's treaty violation in Medellin's case and the courts' failure to provide a remedy for that violation create a dangerous legal precedent, particularly because those failures fit an ongoing pattern of violations by Texas and other states.[13] Other nations may follow the United States' practice by disregarding Article 36's notice requirement and by failing to offer any remedy for its violation. The State Department's own instructions to U.S. law-enforcement authorities regarding consular notification recognize this danger:

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[13] *See Avena*, ¶ 106 (listing 51 cases in which various U.S. jurisdictions violated Article 36).

> The Department of State appreciates the continued cooperation of federal, state, and local law enforcement agencies in helping to ensure that foreign nationals in the United States are treated in accordance with these instructions. *Such treatment will permit the United States to comply with its consular legal obligations domestically and to continue to expect rigorous compliance by foreign governments with respect to United States citizens abroad.*

U.S. DEP'T. OF STATE, CONSULAR NOTIFICATION AND ACCESS 13 (2003) (emphasis added).[14] Reciprocity provides the underpinning for Article 36 and international law generally. To benefit from Article 36 when its citizens travel abroad, the United States must adhere to it domestically.

III. THE UNITED STATES MUST FOLLOW THE ICJ'S *AVENA* JUDGMENT, WHICH SPECIFICALLY ADDRESSES THE MEDELLIN CASE.

The United States has adopted the Optional Protocol, which makes the ICJ the authoritative interpreter of the Vienna Convention and gives the ICJ compulsory jurisdiction over any disputes involving the Convention. Optional Protocol, Art. 1. Mexico invoked that jurisdiction in the *Avena* case to resolve its claims against the United States for violating Article 36 in 54 specific instances, including Medellin's case. The ICJ issued a judgment that requires judicial review of Medellin's case to determine whether Texas's treaty violation prejudiced Medellin's defense. *Avena,* ¶¶ 121, 139. Under the Optional Protocol, the ICJ's decision binds U.S. courts, which must conduct the review ordered in *Avena.*

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[14] *Available at* http://travel.state.gov/law/CNA_book.pdf.

A. The United States proposed, advocated for, and joined the Optional Protocol, which establishes the ICJ as authoritative interpreter of the Convention.

The Optional Protocol provides that "[d]isputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol." Optional Protocol, Art. 1. International law and United States foreign-relations law require domestic courts to follow the Optional Protocol's plain text and to accept the ICJ's interpretations as binding. RESTATEMENT, § 321 cmt. a. These obligations bind not only the national government, but also any political subdivisions, including the states. *See* Aceves, at 267-68. The U.S. Constitution's Supremacy Clause codifies this principle into domestic law by giving preemptive force to ratified treaties. U.S. CONST., art. VI, cl. 2; *Wildenhus's Case*, 120 U.S. 1, 17 (1887).

The United States understood the Optional Protocol's unambiguous terms when it adopted the Protocol. The United States proposed the original text that, in modified form, became Article 1 of the Optional Protocol. *See* Report of the United States Delegation to the Vienna Conference on Consular Relations, *reprinted in* Sen. Exec. Doc. E, 91st Cong., 1st Sess., May 8, 1969, at pp. 72-73. And the United States acted as one of the Optional Protocol's strongest advocates at the Vienna Convention, successfully defeating any efforts to diminish the compulsory jurisdiction that the Protocol conferred on the ICJ. *Id.* By adopting the Optional Protocol, the federal government made it "part of the Supreme law of the United States," and Texas must therefore give the Protocol "force and effect." *Wildenhus's Case*, 120 U.S. at 17. As Oklahoma Court of Criminal Appeals Justice

Charles Chapel noted in his *Torres* concurrence: "The United States is bound by the terms of the treaty and the State of Oklahoma is obligated by virtue of the Supremacy Clause to give effect to the treaty." Pet. App., at 150A.

B. *Avena* requires U.S. courts to review—without resorting to procedural default doctrines—the effect that Texas's treaty violation had on Medellin's defense.

Mexico's application instituted ICJ proceedings against the United States under the Optional Protocol for "violations of the Vienna Convention on Consular Relations," in connection with the cases of 54 Mexican nationals, including Medellin. *Avena*, ¶ 1. In addition to seeking declarations that denying consular notice under Article 36 violated international law, Mexico asked the ICJ for relief that would "restore the *status quo ante*, that is, re-establish the situation that existed before the detention of, proceedings against, and convictions and sentences of, Mexico's nationals in violation of the United States' international legal obligations." *Id.*, ¶ 14(5). The United States participated fully in the *Avena* proceedings.

When it reached the merits, the ICJ determined that local authorities in the United States had violated Article 36 in 51 cases, including Medellin's case. *Id.*, ¶¶ 106, 114. But the ICJ did not order the *status quo* restoration sought by Mexico. Rather, the ICJ ordered a more limited remedy, requiring judicial review and reconsideration of the Mexican nationals' sentences by "tak[ing] account of the violation of the rights set forth in the Convention and guarantee[ing] that the violation and the possible prejudice caused by that violation will be fully examined." *Id.*, ¶ 138 (citations omitted). The ICJ judgment precludes application of "procedural default" as a bar to substantive review and requires "review and reconsideration . . . both of the sentence and of the conviction." *Id.*, ¶¶ 131-39. "[W]hat is crucial in the review and reconsideration process is the existence of a procedure which guarantees that full weight is given to violation of the rights set forth in the Vienna Convention . . . ." *Id.*, ¶ 139. Because the *Avena* judgment directly addresses Medellin's case, the Optional Protocol binds U.S. courts to follow that judgment.

The full consideration and U.S. participation that preceded the ICJ's issuing its *Avena* decision distinguishes this case's circumstances from this Court's earlier decisions in *Federal Republic of Germany v. United States*, 526 U.S. 111 (1999) (*per curiam*) and *Breard v. Greene*, 523 U.S. 371 (1998) (*per curiam*). In those instances, Germany and Paraguay had filed ICJ actions just days or hours before scheduled executions and then asked this Court to stop those executions based on provisional stay orders that the ICJ issued immediately after the cases were filed. *Federal Republic of Germany*, 526 U.S. at 111-12; *Breard*, 523 U.S. at 374. In both instances, this Court made particular note of the tardiness in seeking relief, and the United States contended that the ICJ's provisional orders were not binding. *See* William J. Aceves, *International Decision: Case Concerning the Vienna Convention on Consular Relations (Federal Republic of Germany v. United States)*, 93 AM. J. INT'L L. 924, 926 n.16 (1999). In Medellin's case, the plea is not tardy, because the ICJ decided *Avena* long before his scheduled execution and he raised *Avena* as grounds for relief in the Court of Appeals. *Medellin v. Dretke*, 371 F.3d 270, 280 (5th Cir. 2004).[15] Unlike the ICJ orders at issue in *Federal Republic of Germany* and *Breard*, the United States has never argued that the ICJ's final judgment in *Avena* is not binding. Denying Medellin the remedy ordered in *Avena*—substantive review of the effect that Texas's treaty violation had upon his defense—would amount to contumacy of a fully considered ICJ judgment and would compound the original international-law violation that occurred when Texas authorities violated Article 36. *See* Frederic L. Kirgis, *Restitution as a Remedy in U.S. Courts for Violations of International Law*, 95 AM. J. INT'L L. 341, 343 (2001) ("International law includes not only norms regarding substantive conduct, but also binding remedial norms. The remedial norms are important.").

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[15] Although the ICJ had not yet issued its *Avena* decision at the time, Medellin raised the Texas authorities' Vienna Convention violation as a ground for relief in the district court, citing the ICJ's final decision in the case that was the basis for this Court's decision in *Federal Republic of Germany*. *Id.*

C. The United Nations Charter requires the United States to comply with ICJ judgments.

The United States has ratified the United Nations charter, a multilateral treaty. Charter of the United Nations, June 26, 1945, 59 Stat. 1031 [hereinafter "U.N. Charter"]. The U.N. Charter establishes the ICJ as the United Nations' "principal judicial organ," and "each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party." U.N. Charter, Art. 92, 94. By adopting Article 94 of the U.N. Charter, the United States has "transferr[ed] adjudicatory authority to the U.N. and its organs," and attributes "binding legal force to their decisions." Sanja Djajic, *The Effect of International Court of Justice Decisions on Municipal Courts in the United States: Breard v. Greene*, 23 HASTINGS INT'L & COMP. L. REV. 27, 50 (1999). Furthermore, Article 93 of the U.N. Charter makes all U.N. members parties to the Statute of the International Court of Justice; the United States ratified the ICJ Statute in conjunction with the U.N. Charter. Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1031 [hereinafter "ICJ Statute"]. The ICJ Statute, in turn, further reaffirms an ICJ judgment's "binding force" as between the parties to an ICJ case. ICJ Statute, Art. 59, 60. Like the Optional Protocol, the U.N. Charter and the ICJ Statute require the United States to comply with *Avena*, a case to which the United States was a party.

CONCLUSION

Medellin's case presents questions of urgent national and international importance. The United States relies on Vienna Convention Article 36 to protect its nationals in foreign countries, but the continued viability of Article 36 depends on reciprocal adherence to its mandates. A pattern of denying consular notification has emerged in local U.S. jurisdictions, and only a judicial remedy for those violations can ensure continuing compliance with Article 36 around the world. Moreover, the ICJ, which had compulsory jurisdiction over Mexico's claim against the United States for violating Article 36, issued an order requiring U.S. courts to review the violation in Medellin's case to determine the effect it had on his defense. Compliance with the ICJ's judgment will reinforce the rule of law, which the United States so forcefully advocates around the world.

For all the reasons stated in this Brief, this Court should reverse the Court of Appeals' judgment and remand the case with instructions to apply *Avena* as the rule of decision.

Respectfully submitted,

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IN THE

Supreme Court of the United States

JOSE ERNESTO MEDELLIN

Petitioner,

v.

DOUG DRETKE, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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STATEMENT OF INTEREST[1]

The Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 [Vienna Convention], requires all signatory nations, including the United States, to inform "without delay" any detained foreign national of his right to request assistance from the consul of his own nation and, if the national so requests, to inform "without delay" the consular office of that national's detention or arrest. Notwithstanding these obligations, the state of Texas arrested, tried, convicted, and sentenced Petitioner Jose Ernesto Medellin—a Mexican national—to death, without ever informing him of his right to seek assistance from the Mexican Consulate.

In January 2003, the Mexican government brought suit in the International Court of Justice [ICJ] against the United States under the Optional Protocol Concerning the Compulsory Settlement of Disputes [Optional Protocol], which both Mexico and the United States have ratified,[2] alleging that the United States had violated the Vienna Convention in Petitioner's case, among others. After full briefing and oral argument, the ICJ, on March 31, 2004, issued a final judgment holding, *inter alia*, that the United States had violated the Vienna Convention by failing to inform 51 identified Mexican nationals—including Petitioner—"of their rights" under the Convention "to notify the Mexican consular post of the[ir] detention." *Avena and Other Mexican Nationals* (Mexico v. United States), 2004 I.C.J. No. 128, at 43 [*Avena*]. To remedy that violation, the ICJ determined that the United States should "allow the review and reconsideration of the conviction[s] and sentence[s] by taking account of the violation of the rights set forth in the Convention." The Fifth Circuit refused, holding that the Vienna Convention creates no individually enforceable rights and that no judicial remedy is available for the violation of Petitioner's rights.

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[1] No party other than the *Amici* and their counsel authored this brief in whole or in part, and no person or entity, other than *Amici* and their counsel, has made a monetary contribution to the preparation or submission of this brief. Both parties have granted consent to the filing of this *amici curiae* brief. Letters of consent are on file with the Clerk of the Court.

[2] The Optional Protocol provides that any disputes "arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice." Optional Protocol Concerning the Compulsory Settlement of Disputes, Apr. 24, 1963, 21 U.S.T. 325, 326, 596 U.N.T.S. 487, 488.

Amici have served as Senior State Department Officials, Ambassadors, and Legal Advisers to the U.S. Department of State, representing the government of the United States at home and abroad in both Republican and Democratic administrations.[3] *See Crosby v. National Foreign Trade Council*, 530 U.S. 363, 385 (2000) ("[O]pinions of senior National Government officials are competent and direct evidence of the frustration of congressional objectives by [a] state Act."). *Amici* vary widely in their views regarding whether or not the death penalty can ever be lawfully administered and do not express any opinion on what the ultimate resolution of Petitioner's conviction and sentence

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[3] *Amici* include former Secretary of State Madeleine K. Albright, former Deputy Secretary of State Strobe Talbott, former Under Secretary of State Thomas R. Pickering, former ambassadors Stephen W. Bosworth, Jeffrey Davidow, James R. Jones, John O'Leary, J. Stapleton Roy, Nancy Soderberg, Malcolm R. Wilkey and Frank G. Wisner, former Legal Advisers Herbert J. Hansell and Abraham D. Sofaer, and Special Presidential Envoy James C. O'Brien. Of their number, four have retired with the rank of Career Ambassador, the highest rank that can be awarded to members of the United States Foreign Service. Ambassador Wilkey and Legal Adviser Sofaer were formerly federal judges, on the United States Court of Appeals for the D.C. Circuit, and the U.S. District Court for the Southern District of New York, respectively. *Amici* appear in their personal capacities. Current affiliations of *Amici* are provided here for identification purposes only, and are not intended to convey the views of their affiliated institutions on the questions presented here. The qualifications of *Amici* are listed in the Addendum to this brief.

should be after review and reconsideration. Some of the signatories of this brief also disagree as to the correctness and merits of the ICJ's interpretations of the Vienna Convention. But all *Amici* agree that, so long as the United States adheres to the Optional Protocol, it is obliged to abide by those decisions, and that this Court's failure to respect the ICJ's judgment in *Avena* would significantly impair the credibility of American diplomats in the international arena.

Refusing to respect the ICJ's final judgment in *Avena* would violate U.S. obligations under four interconnected treaties that the President and Senate ratified—the Vienna Convention, its Optional Protocol, the United Nations Charter, and the annexed Statute of the ICJ.[4] To affirm the Fifth Circuit and condone such multiple treaty violations would impair important U.S. foreign policy interests and reduce American standing in the world community.

Amici believe that "[g]reat nations, like great men [and women], should keep their word," *FPC v. Tuscarora Indian Nation*, 362 U.S. 99, 142 (1960) (Black, J., dissenting). This Court should reverse the Fifth Circuit's ruling, which is inconsistent with sovereign commitments we have made, and will disrupt our diplomatic relations with close American allies and damage critical U.S. interests governed by other treaty regimes.

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[4] In 1945, the United States accepted the duty to comply with ICJ judgments when the Senate advised and consented to ratification of the U.N. Charter and the annexed Statute of the ICJ, 59 Stat. 1055, T.S. 993 (1945) [ICJ Statute], as a treaty under Article II of the Constitution. The ICJ is the "principal judicial organ of the United Nations." Charter of the U.N., *entered into force* Oct. 24, 1945, art. 92, 59 Stat. 1031, 1051. Under Article 94(1) of the Charter, "[e]ach Member of the United Nations undertakes to comply with the decision of the [ICJ] in any case to which it is a party." *Id.* Article 93 of the Charter declares all U.N. Members to be *ipso facto* parties to the ICJ Statute, which is annexed to and an integral part of the U.N. Charter. *Id.* Under Article 59 of the ICJ Statute, decisions of the Court have "no binding force *except between the parties and in respect of that particular case*." ICJ Statute, 59 Stat. at 1062 (emphasis added). Thus, the *Avena* decision has binding force between the United States and Mexico with respect to Petitioner Medellin and fifty other Mexican nationals who are specifically mentioned in the ICJ's judgment. *See Avena*, 2004 I.C.J. No. 128, at 43.

SUMMARY OF ARGUMENT

The ability of U.S. diplomats to carry out important foreign policy objectives from the Founding to the present day has critically depended upon strong enforcement of our treaty obligations by the federal government and federal courts. The Framers' difficult experiences under the Articles of Confederation taught them that the United States cannot credibly conduct its foreign relations unless it honors its treaty obligations. The severely limited treaty power granted to the Continental Congress nearly crippled the young nation by failing to ensure that state governments would abide by our treaty obligations. Indeed, state violations of national treaty obligations led important allies and adversaries to refuse to both honor their reciprocal treaty obligations and enter new commercial treaties with the United States.

In drafting the Constitution, the Framers made sure that the federal government would have the authority to bind the entire nation, including the individual states, to our international obligations. Since its inception, this Court has repeatedly reaffirmed that understanding. This Court has regularly held that treaties duly entered by the national government supersede conflicting state laws and bind the states to our national commitments.

Texas's noncompliance in this case with the Vienna Convention and its Optional Protocol offends the Framers' constitutional vision and has created the kind of diplomatic failures that prompted the formation of the treaty power. Texas's and other states' persistent practice of ignoring the Vienna Convention obligations has strained bilateral and multilateral relations, and has disrupted important national foreign policy interests by impairing the ability of diplomats to carry out critical initiatives with foreign governments and international organizations. Moreover, state noncompliance

with our treaty obligations has caused allies and adversaries alike to criticize the United States and to question our longstanding leadership in international law and human rights.

This Court's decision will affect not just the ability of the United States to enforce the Vienna Convention, but, more broadly, our nation's capacity to participate effectively in a diverse array of treaty regimes. Our executive and legislative branches of government have regularly chosen compulsory international adjudication as a means to protect our interests in national security and international trade. American diplomats have pursued and successfully secured numerous treaties that confer jurisdiction on the ICJ and other international dispute-settlement bodies. As American private commercial interests become increasingly global, reliable mechanisms for international dispute resolution will become increasingly central to our nation's foreign policy. The United States cannot build or benefit from these mechanisms, so long as its states and localities continue to violate ratified treaties and jeopardize our global reputation as a dependable treaty partner.

ARGUMENT

I. THE TREATY POWER AUTHORIZES THE PRESIDENT AND THE SENATE TO ENTER INTO TREATY OBLIGATIONS THAT ARE BINDING ON THE STATES AND OVERRIDE CONFLICTING STATE LAWS

A. Numerous Diplomatic Failures Under The Articles Of Confederation Led To The Creation Of Federal Authority Under The Treaty Power

The Framers established the treaty power (U.S. CONST., art. II, § 2, cl. 2) in response to their frustrating experience under the Articles of Confederation.[5] That experience taught that permitting the states to impair the nation's treaty obligations would significantly impede the conduct of the fledgling nation's foreign affairs.

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[5] *See generally* FREDERICK W. MARKS III, INDEPENDENCE ON TRIAL, FOREIGN AFFAIRS AND THE MAKING OF THE CONSTITUTION (1973)

Under the Articles of Confederation, the Continental Congress possessed the treaty power,[6] but virtually all legislative authority rested with the states.[7] This structure left Congress nominally responsible for foreign affairs, but ultimately dependent on the good faith of the states to carry out those treaty obligations. *See generally* SAMUEL B. CRANDALL, TREATIES, THEIR MAKING AND ENFORCEMENT 19-43 (1904). This structure caused repeated failures for Congress in its diplomatic endeavors, as the states routinely refused to carry out important national treaty obligations.

The most serious failure involved the Treaty of Peace with Great Britain of 1783, which secured recognition of both the independence of the United States of America and the U.S. claim to expansive boundaries. Negotiated by Benjamin Franklin, John Adams, and John Jay, the Treaty of Peace was quickly attacked on the ground that its principal concessions to the British—particularly the Treaty's financial and amnesty provisions in Articles IV and VI—infringed upon the authority of the states.[8] Almost immediately, a number of state legislatures passed laws that violated Articles IV and VI.[9] As states continued to resist the terms of the Treaty of Peace, tensions with Great Britain worsened—so much so that the British refused to carry out its reciprocal obligation to withdraw troops from military posts in the northwestern territory. CRANDALL, *supra*, at 40-42. Critically, the Framers' experience with the fractious behavior of the states under the Treaty of Peace was repeated in our diplomatic efforts to establish commercial relations as other nations became openly skeptical of the trustworthiness of the United States as a treaty partner.[10]

(difficulty of obtaining state compliance with treaties motivated the Constitutional Convention); David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075, 1102-49 (2000) (reviewing history).

[6] Article IX of the Articles of Confederation granted Congress sole and exclusive power to make treaties and alliances, but subject to the restriction "that no treaty of commerce shall be made whereby the legislative power of the respective States shall be restrained from imposing such imposts and duties on foreigners, as their own people are subjected to, or from prohibiting the expropriation or importation of any species of goods or commodities whatsoever." ARTICLES OF CONFEDERATION AND PERPETUAL UNION, art. IX.

[7] For example, the Continental Congress had no authority to regulate interstate or foreign commerce. *See id.* art. II ("Each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States, in Congress assembled.").

[8] Article IV of the Treaty provided, *inter alia*, that all debts owed to British creditors that had been extinguished under state law would be resuscitated. Article VI provided that there would be no further confiscations, prosecutions, or other actions taken against Loyalists and that those Loyalists still in prison would be released. Treaty of Peace with Great Britain, Sept. 3, 1783, 12 Bevans 8, 11-12.

[9] For example, in 1783, New York enacted a series of laws that patently violated Article VI, asserting that that provision was beyond Congress's authority and, thus, null. In response, Alexander Hamilton argued in support of congressional authority to enter the obligations of the Treaty of Peace:

> Does not the act of confederation place the exclusive right of war and peace in the United States in Congress? Have they not the sole power of making treaties with foreign nations? Are not these among the first rights of sovereignty, and does not the delegation of them to the general confederacy, so far abridge the sovereignty of each particular state?

Alexander Hamilton, A Letter from Phocion to the Considerate Citizens of New York (Jan. 1-27, 1784), *reprinted in* 3 THE PAPERS OF ALEXANDER HAMILTON 489 (Harold C. Syrett & Jacob E. Cooke eds. 1962).

[10] Indeed, foreign skepticism about the Continental Congress's ability to enter binding treaties limited that body's ability to negotiate any commercial treaties other than a limited commercial treaty with Prussia.

The ensuing diplomatic paralysis profoundly affected the Framers' vision of the proper scope of the treaty power. During the Convention, Madison remarked upon the "constant tendency in the States . . . to violate national treaties."[11] Alexander Hamilton echoed the same concern in *The Federalist Papers*.[12]

Golove, *supra*, at 1131; *see also id.* (citing SAMUEL FLAGG BEMIS, A DIPLOMATIC HISTORY OF THE UNITED STATES 66 (4th ed. 1955) ("[A]bortive negotiations with other powers, notably Austria and Denmark, failed because the growing ineptitude and powerlessness of the Confederation to enforce its treaties against the thirteen component states convinced foreign nations that the Continental Congress had ceased to be a responsible body and that the United States itself might soon cease to be a nation.")).

For example, in response to the American commissioners' request to open commercial treaty negotiations with Great Britain, the Duke of Dorset replied:

> I have been . . . instructed to learn from you, gentlemen, what is the real nature of the powers with which you are invested,—whether you are merely commissioned by Congress, or whether you have received separate powers from the respective States . . . . [R]epeated experience having taught . . . how little the authority of Congress could avail in any respect . . . .

1 GEORGE TICKNOR CURTIS, HISTORY OF THE ORIGIN, FORMATION, AND ADOPTION OF THE CONSTITUTION OF THE UNITED STATES 289-90 n.1 (1854) (quoting Letter from Duke of Dorset to American Commissioners (Mar. 26, 1785)).

Likewise, Lord Sheffield contended:

> No treaty can be made with the American States that can be binding on the whole of them. The act of Confederation does not enable Congress to form more than general treaties: at the moment of the highest authority of Congress, the power in question was with-held by the several States.

Golove, *supra*, at 1128 (quoting JOHN LORD SHEFFIELD, OBSERVATIONS ON THE COMMERCE OF THE AMERICAN STATES 199-200 (Dublin, Luke White 2d ed. 1784)).

[11] 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 164 (Max Farrand ed., rev. ed. 1937). Madison explained:

To ensure national compliance with treaties, the Framers drafted three constitutional provisions establishing that treaties would bind the states and supersede conflicting provisions of state law. The Treaty Clause of the U.S. Constitution granted the nation's treaty power exclusively to institutions of the federal government.[13] Article I, Section 10 further specified that that grant was exclusive, providing "No state shall enter into any Treaty, Alliance, or Confederation." U.S. CONST. art. I, § 10. Finally, the Supremacy Clause declared that the Constitution, the laws of the United States made pursuant thereto, and "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby . . . ." *Id.* art. VI, cl. 2.

As the text and structure of these provisions make plain, where our nation's foreign policy is concerned, the Constitution does not recognize dual sovereignty. *See, e.g.*, THE FEDERALIST NO. 42 (James Madison). In Madison's famous words, "If we are to be one nation in any respect, it clearly ought to be in respect to other nations." *Id.* When treaties are at issue, the states disappear and the President

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> The tendency of the States to [treaty] violations has been manifested in sundry instances. The files of Congs. contain complaints already, from almost every nation with which treaties have been formed. . . . A rupture with other powers is among the greatest of national calamities. It ought therefore to be effectually provided that no part of a nation shall have in its power to bring them on the whole.

Id. at 316.

[12] Due to the states' repeated violations of treaty obligations, Hamilton noted, "[t]he faith, the reputation, the peace of the whole Union are . . . continually at the mercy of the prejudices, the passions, and the interests of every member of which it is composed." THE FEDERALIST NO. 22 (Alexander Hamilton).

[13] The President shall have the "Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur." U.S. CONST. art. II, § 2, cl. 2.

and Senate act, in the words of the Supremacy Clause, with the sole "Authority of the United States."[14]

Further confirmation of the broad treaty power that the Framers established in order to bind states comes from one of the first treaties ratified by the new American government: a Consular Convention with France, a bilateral precursor to the modern-day Vienna Convention on Consular Relations.[15] That treaty, ratified by the first Senate in 1789, extended foreign consular officials extensive immunities from the operation of state laws, ceded consuls jurisdiction to administer estates of deceased French nationals, and opened the state courts to French nationals. In ratifying the treaty, the Senate had no doubt of its authority to bind the states and to supersede state laws in areas that otherwise fell within the legislative province of the states. *See generally* Golove, *supra*, at 1149-50 & nn. 223, 225.

B. This Court Has Consistently Recognized That States Must Comply With Our Treaty Obligations To Maintain U.S. International Credibility And To Avoid Diplomatic Failures

Since its inception, this Court has ensured that our nation upholds its binding international obligations, notwithstanding contrary internal laws and policies of the individual states. Less than a decade after the Constitution took effect, this Court first invoked its authority to enforce the provisions of federal treaties and affirmed the Framers' vision that the national treaty authority supersedes any inconsistent or conflicting state laws: In *Ware v. Hylton*, this Court held that, pursuant to the Supremacy Clause, Article IV of the Treaty of Peace—which ensured British creditors that they would "meet with no lawful impediment to the recovery" of debts—nullified a conflicting Virginia statute that permitted such debts to be discharged. 3 U.S. (3 Dall.) 199, 235, 239 (1796).[16]

Subsequently, this Court has consistently enforced treaty rights, making clear the fundamental principle that treaties are supreme over inconsistent state law.[17] In *United States v. Pink*, in which this Court held that a policy of the State of New York could not override national obligations established in an agreement between the United States and the Soviet Union, the Court declared: "No State can rewrite our foreign policy to conform to its own domestic policies. Power over external affairs is not shared by the States; it is vested in the national government exclusively." 315 U.S. 203, 233 (1942).[18] And in *United States v. Belmont*, the Court made clear that "[i]n respect of all international negotiations and compacts, and in respect of our foreign relations generally, *state lines disappear*." 301 U.S. 324, 331 (1937) (emphasis added).[19]

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[14] While the Constitution does not place substantive restrictions in favor of the states on the exercise of the treaty power, the Constitution does provide for the protection of the states' interest through the Senate's role in the ratification process. *See generally* THE FEDERALIST NO. 64 (John Jay) (discussing the Senate's role in protecting the interests of the states "[a]s all the States are equally represented").

[15] *See* Convention Defining and Establishing the Functions and Privileges of Consuls and Vice Consuls, Nov. 14, 1788, U.S.-France, 8 Stat. 106, 7 Bevans 794.

[16] As the Court explained, "[a] treaty cannot be the supreme law of the land, that is of all the United States, if any act of a State Legislature [or constitution or court] can stand in its way." *Id.* at 236.

[17] *See, e.g.*, *Asakura v. City of Seattle*, 265 U.S. 332, 341 (1924) (stating that "[a treaty] will be applied and given authoritative effect by the courts" and holding that a city ordinance was unenforceable because it violated a treaty between the United States and Japan); *Hauenstein v. Lynham*, 100 U.S. 483 (1879) (holding that a treaty between the United States and the Swiss Confederation superseded inconsistent state law).

[18] As this Court explained, "[S]tate law must yield when it is inconsistent with, or impairs the policies or provisions of, a treaty or of an international compact or agreement. . . . [The treaty power] need not be so exercised as to conform to state laws or state policies, whether they be expressed in constitutions, statutes, or judicial decrees. And the policies of the States become wholly irrelevant to judicial inquiry when the United States, acting within its constitutional sphere, seeks enforcement of its foreign policies in the courts." *Id.* at 230-31, 233-34.

Likewise, this Court has consistently recognized that the constitutional vesting of full authority over foreign affairs in the federal government benefits our country by enabling us more effectively both to engage in relations with other nations and to protect the interests of our citizens.[20] As this Court put it in *Crosby v. National Foreign Trade Council*, effective diplomacy is best served when the federal government alone speaks for the entire United States on foreign matters: "Quite simply, if the [state] law is enforceable the President has less to offer and less economic diplomatic leverage as a consequence." 530 U.S. 363, 377 (2000).[21]

Taken together, these constitutional principles and precedents firmly establish the federal government's sole

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[19] *See also id.* ("[C]omplete power over international affairs is in the national government and is not and cannot be subject to any curtailment or interference on the part of the several states."); *cf. Missouri v. Holland*, 252 U.S. 416, 434 (1920) (holding that the treaty power is not subject to "some invisible radiation from the general terms of the Tenth Amendment").

[20] *See, e.g., Pink*, 315 U.S. at 232 ("If state action could defeat or alter our foreign policy, serious consequences might ensue. The nation as a whole would be held to answer if a State created difficulties with a foreign power."); *Belmont*, 301 U.S. at 331 (relying on Madison's statement during the constitutional debates that "[t]o counteract [a treaty] by the supremacy of the state laws, would bring on the Union the just charge of national perfidy, and involve us in war").

[21] In *Crosby*, this Court faced a Massachusetts law that threatened to invite World Trade Organization (WTO) enforcement action by the European Communities. While "express[ing] no opinion on the merits of [those] proceedings," the Court struck down the offensive state law, at least partly because an adverse WTO complaint against the United States would serve to "embroil the National Government . . . in international dispute proceedings" and "threaten[] relations with the United States." *Id.* at 383 & n.19.

authority to bind the entire nation to treaty obligations to achieve national foreign policy interests. Yet, in this case, the Fifth Circuit ignored those national obligations out of deference to local state concerns, precisely the result that the Framers drafted the treaty clauses to avoid.[22]

II. FAILURE TO ADHERE TO THE ICJ'S FINAL JUDGMENT IN *AVENA* WOULD UNDERMINE U.S. DIPLOMATIC CREDIBILITY

The Vienna Convention and its Optional Protocol are precisely the kind of treaties that the Framers had in mind when they rendered treaties supreme over inconsistent state law.[23] Texas's noncompliance with the ICJ's ruling in *Avena* defies the authority of the federal government to bind the states to international obligations. *Amici* believe that, if left unchecked, the persistent failure of Texas and other states of the Union to comply with *Avena* will surely alienate this nation from its allies. Likewise, *Amici* believe that the refusal of state and federal courts (such as the Fifth Circuit here) to provide the "review and reconsideration" required by the ICJ's judgment will undermine America's credibility as a global leader, and seriously hinder foreign policy objectives at a critical time in our nation's history.

The United States has long declared that the right to consular access guaranteed by the Vienna Convention and its Optional Protocol is "widely accepted as the standard of international practice of civilized nations."[24] Through its diplomats, our government routinely calls on such nations as Iraq, Syria, China, and North Korea to abide by this minimal standard when U.S. citizens are detained abroad.[25] Over two decades ago, when Iran flagrantly violated the Vienna Convention by taking U.S. diplomats hostage in Tehran, then flouted its obligation under the Optional Protocol to comply with the ICJ's order to release the hostages, then-President Carter accused Iran of showing "'contempt, not only for international law, but for the entire international structure for securing the peaceful resolution of differences among nations.'"[26] The United States led an effort to convince

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[22] Although recognizing that the ICJ's decision in *Avena* in 2004 held that "procedural default rules cannot bar review of a petitioner's claim," the Fifth Circuit nevertheless deferred to Texas's procedural default rule and denied Petitioner's application for a certificate of appealability, on the basis that the Supreme Court's earlier opinion denying review in *Breard v. Greene*, 523 U.S. 371, 375 (1998), reasoned "that ordinary procedural rules can bar Vienna Convention claims." *Medellin v. Dretke*, 371 F.3d 270, 279-80 (5th Cir. 2004).

[23] *See generally* Brief of *Amici Curiae* International Law Experts (discussing the difficulties enforcing previous treaty regimes on consular assistance that lack binding dispute-resolution mechanisms).

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[24] Victor M. Uribe, *Consuls at Work: Universal Instruments of Human Rights and Consular Protection in the Context of Criminal Justice*, 19 HOUS. J. INT'L L. 375, 385 (1997) (quoting telegram sent from U.S. Department of State to its Embassy in Damascus on February 21, 1975).

[25] *Transcript of State Dep't Regular Briefing*, FED. NEWS SERV., July 15, 1999 (James Rubin, State Dep't spokesman, commenting on detention of U.S. female citizen: "We remind the government of North Korea of its obligations under the Interim Consular Agreement of 1994 and the Vienna Convention on Consular Relations to permit consular access to detained U.S. citizens."); *Transcript of State Dep't Regular Briefing*, FED. NEWS SERV., Aug. 19, 1999 (James Rubin, State Dep't spokesman, reporting on request for access and immediate grant of access to U.S. citizen detained in China); Associated Press, *Iraqis Refuse Access to Americans for Second Day*, Apr. 19, 1995 (quoting State Department spokesman: "Obviously, we are extremely disappointed that the Iraqi government has reneged on its promise to allow these weekly visits. We're disappointed because that is their legal obligation under the Vienna convention."); S. Adele Shank & John Quigley, *Foreigners on Texas's Death Row and the Right of Access to a Consul*, 26 ST. MARY'S L.J. 719, 729 (1995) (quoting Consular Officers and Consulates, 1977 Digest § 2, at 290) (U.S. protest of delay in notification of detention of U.S. missionaries in El Salvador); *see also* LUKE T. LEE, CONSULAR LAW AND PRACTICE, 145-46 (2d ed. 1991) (documenting U.S. invocation of the Vienna Convention).

[26] Philippe Sands, *An Execution Heard Around the World*, L.A. TIMES, Apr. 16, 1998, at B9 (quoting President Carter's comments during the Iranian hostage crisis).

nations throughout the world to confer compulsory jurisdiction on the ICJ precisely because it was dissatisfied with diplomatic overtures alone as the sole mechanism for enforcing the Vienna Convention.[27]

Today, our closest allies now accuse the United States of showing that same disregard for the Vienna Convention and the ICJ. Nations such as the United Kingdom, Mexico, Canada, Spain, Paraguay, Germany, and Italy have repeatedly objected to the U.S. practice of executing nationals of these countries after state and local violations of the Vienna Convention. Through numerous calls, meetings, and letters to both state and federal authorities, our allies have strenuously requested review and reconsideration of the convictions and sentences of their citizens, in compliance with the Vienna Convention and earlier provisional orders of the ICJ.[28] Perhaps in no other area of our foreign policy have *Amici* so consistently heard foreign heads of state, foreign ministers, and foreign ambassadors pleading for the enforcement of U.S. treaty obligations.

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[27] *See* Brief of *Amici Curiae* Ambassador L. Bruce Laingen and Capt. John J. Swift, *et al.*, at 6-16; *see also United Nations Conference on Consular Relations Official Records*, 1st Comm., 29th mtg., ¶¶ 36, 54, U.N. Doc. A/CONF.25/16 (1963) [Official Records]; *id.* at Plenary mtg, 21st mtg., ¶¶ 17-20; VIENNA CONVENTION ON CONSULAR RELATIONS, SEN. EXEC. REP. 91-9, at 19 (1969) (statement of J. Edward Lyerly, Deputy Legal Adviser for Administration of the State Dep't).

[28] *See, e.g.*, Ginger Thompson, *An Execution in Texas Strains Ties with Mexico and Others*, N.Y. TIMES, Aug. 16, 2002, at A6 (citing call from President Fox of Mexico); Jonathan Tepperman, *Faulder: The Long-Term View*, NAT'L POST (Toronto), Dec. 11, 1998 (documenting efforts by Canadian Foreign Affairs Minister and Ambassador on behalf of Canadian citizen); Laura LaFay, *World Court—U.S. to Halt Execution*, VIRGINIAN-PILOT, Apr. 10, 1998, at A1 (describing protests by Mother Teresa, Pope John Paul II, and Italian government to execution of Italian citizen); Somini Sengupta, *Appeal in Murder Cites International Treaty*, N.Y. TIMES, Dec. 23, 1997, at B5 (letter from Ecuadorean Consul General); David Schwartz, *Plan to Execute German Killers Attracts Scrutiny*, DALLAS MORNING NEWS, Feb. 22, 1999, at A1 (describing efforts by then-German President Herzog, Chancellor Schroeder, Foreign Minister Fischer, and Ambassador Chrobog requesting support for clemency from President Clinton and Arizona Governor Hull); *see also* Rodrigo Labardini, *International Court of Justice Finds U.S. Breached*

Indeed, officials of our closest neighbors, Canada and Mexico, have openly declared that the failure of American state authorities to provide their nationals with timely consular access has "strain[ed]" bilateral relations.[29] For example, in 2002, long before the ICJ issued its final judgment in *Avena*, Mexican President Vicente Fox took the extraordinary step of canceling a trip to President Bush's Texas ranch as "'an unequivocal signal of rejection of the execution'" of a Mexican national who had not been informed of his consular rights.[30]

International and regional human rights bodies have echoed the protests of foreign governments. The Inter-American Commission on Human Rights, the European Parliament, and the U.N. High Commissioner for Human Rights have each strongly criticized U.S. violations of the

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its Obligations Under the Vienna Convention on Consular Relations, 20 INT'L ENFORCEMENT L. REP. 250, 251 n.8 (June 2004) (documenting six letters the government of Mexico sent to the United States regarding the execution of Irineo Tristan Montoya by Texas in 1997). Unlike these earlier cases, the Fifth Circuit's ruling under review ignores a final judgment of the International Court that has "binding force" with respect to the parties. *See supra* note 4.

[29] Raymond Bonner, *U.S. Bid to Execute Mexican Draws Fire*, N.Y. TIMES, Oct. 26, 2000, at A20 (quoting Jorge G. Castaneda, foreign policy advisor to Mexican President Fox); Colin Nickerson, *Canadians Protest a Texas Execution; Inmate Set to Die Today for 1975 Killing*, BOSTON GLOBE, Dec. 10, 1998, at A2 (describing statements by Canadian government officials responding to execution of Canadian citizen Stanley Faulder who had been denied consular rights).

[30] Brian Knowlton, *Execution Pits Mexico Against U.S.; Fox Echoes World on the Death Penalty*, INT'L HERALD TRIB., Aug. 16, 2002, at 1 (quoting President Fox's representative).

Vienna Convention.[31] The European Union has lodged numerous official demarches with state authorities requesting reconsideration of pending executions because of violations of the Vienna Convention.[32]

The widespread international opposition to the states' persistent practice of violating the Vienna Convention and refusing to abide by the decisions of the ICJ under the Optional Protocol has harmed our position as a human rights leader.[33] Our authority in several important international human rights bodies has been impaired.[34] International disapproval of our noncompliance with the Vienna Convention has also deflected attention away from serious human rights abuses in other countries and has provided our adversaries with diplomatic ammunition to raise doubts about the sincerity of our commitment to human rights.

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[31] *See, e.g.*, Ramón Martinez Villareal v. United States, Case 11.753, Report No. 52/02, Inter-Am. C.H.R., ¶¶ 69-70 (2002) (describing notification of right to consular assistance as "among the minimum guarantees essential for foreign nationals also to adequately prepare their defense and receive a fair trial" and failure to notify of such rights violated Mexican national's right to due process); *Resol. On the Death Sentence Handed Down on Greg Summers in Texas, USA*, B4-0188/99, 1999 O.J. (C 150) 383-84 (passing resolution condemning persistent U.S. failure to notify foreign nationals of rights to consular access and noting "demonstrably extremely poor quality" of defense counsel in case of two German brothers on death row who had not had consular assistance); Kevin Sullivan, *Mexico Challenges U.S. on Death Penalty Cases*, WASH. POST, Jan. 10, 2003, at A17 (citing concerns expressed by U.N. High Commissioner for Human Rights regarding the execution of Javier Suarez Media, a Mexican citizen, because of the denial of his rights under the Vienna Convention by the state of Texas); Dana Priest & John M. Goshko, *Genocide Warning Center Established; Clinton Human Rights Initiatives Include Changes at INS*, WASH. POST, Dec. 11, 1998, at A52 (referring to speech by U.N. High Commissioner for Human Rights before U.N. General Assembly, criticizing the execution of Joseph Stanley Faulder, a Canadian citizen, because of the denial of his rights under the Vienna Convention by the state of Texas).

[32] Demarches by the European Union have been filed in a number of cases, including: (1) Joseph Stanley Faulder, Canada, Dec. 8, 1998; (2) Miguel Angel Flores, Mexico, Nov. 3, 2000; (3) Hung Thanh Le, Vietnam, Dec. 4, 2003; (4) Gregory Madej, Poland, May 1, 2001; (5) Javier Suarez Medina, Mexico, July 23, 2002; (6) Osvaldo Torres, Mexico, Apr. 30 and May 6, 2004; (7) Gerardo Valdez Maltos, Mexico, June 5 and July 13, 2001.

[33] *See, e.g.*, Amnesty International, *The Execution of Angel Breard: Apologies Are Not Enough*, *at* http://web.amnesty.org/library/Index/

State violations of the Vienna Convention have also called into question our commitment to the rule of law in international relations.[35] For example, when the German Justice Minister announced Germany's suit against the United States in the ICJ to challenge the execution of two German nationals who were denied consular rights, she declared: "Respecting international laws cannot be a one-way street."[36] When the United States seeks to promote the rule of law around the world, other nations will surely demand that we first comply strictly with our own binding obligations under the U.N. Charter, the ICJ statute, and the Vienna Convention and its Optional Protocol. This is particularly so given that the United States not only spearheaded the effort to create the Optional Protocol to the Vienna Convention, but engaged in energetic diplomacy to convince other nations to adopt it.[37]

Taken together, the continued noncompliance with our obligations under the Vienna Convention and Optional Protocol has significantly hindered the ability of *Amici* and other diplomats to carry out foreign policy initiatives. In *Amici*'s experience, an inordinate proportion of important bilateral and multilateral meetings with our closest allies are now consumed with answering diplomatic demarches challenging these practices, diverting attention away from our core national foreign policy interests.

Our diplomatic efforts overseas have also been impeded by the public hostility stirred by the U.S. practice of executing foreign nationals who have been denied their Vienna Convention rights. The practice has led to persistent criticism in the press and angry demonstrations in front of

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engAMR510271998 (May 1, 1998) (quoting Paraguayan Deputy Foreign Minister Rachid: "[T]here is not an international summit at which they [the U.S. government] do not preach the preservation of human rights. . . . [T]he United States has been the champion of democracy . . . let them be the first one to demonstrate to us the principles of democracy; let them also respect human rights."); George Boehmer, *Killer Loses Fight for Life*, DAILY TEL. (Sydney, Australia), Mar. 4, 1999, at 25 (quoting the German parliament's Human Rights Committee Chairman Roth's reaction to the LaGrand execution: "When (Secretary of State Madeleine) Albright talks of human rights, for example in China, she must prove her credibility by also taking human rights in the United States seriously.").

[34] Shortly after the execution of two German nationals denied their Vienna Convention rights despite a provisional order of the ICJ, the United States was voted off the U.N. Commission on Human Rights in 2001 for the first time in that body's 54-year history. Barbara Crossette, *For First Time, U.S. Is Excluded from U.N. Human Rights Panel*, N.Y. TIMES, May 4, 2001, at A1. The United States likewise failed to win a seat on the Inter-American Commission on Human Rights for the first time since that body's inception in 1959, and its observer status in the Council of Europe—which bans executions—has been put in jeopardy. Connie de la Vega, *Going It Alone*, AM. PROSPECT, July, 2004, at A22.

[35] *See, e.g.*, Raymond Bonner, *Mexican Killer is Refused Clemency by Oklahoma*, N.Y. TIMES, July 21, 2001, at A8 (quoting Mexican government as declaring that execution of Mexican national denied Vienna Convention rights as "contrary to international law and the elemental principles of cooperation between nations"); Roger Cohen, *U.S. Execution of German Stirs Anger*, N.Y. TIMES, Mar. 5, 1999, at 14 (quoting German Justice Minister, declaring that the execution of two German nationals whose Vienna Convention rights had been violated by state officials "is barbaric and unworthy of a [nation] based on the rule of law"); David Stout, *Do as We Say, Not as We Do: U.S. Executions Draw Scorn from Abroad*, N.Y. TIMES, Apr. 26, 1998, § 4 (Week in Review), at 4 (quoting Honduran newspaper upon execution of Honduran national denied rights under the Vienna Convention: "The most powerful country in the world, which claims to be a stickler for justice and legal rectitude, has violated its own precepts.").

[36] *See Germany Sues U.S. for Breaking Law*, REUTERS, Sept. 16, 1999, available at http://www.ub.es/penal/historia/PdeM/dpicintl.htm.

[37] Official Records, *supra* note 27, 1st Comm., 29th mtg., ¶¶ 36, 54; *id.*, at Plenary mtg, 21st mtg., ¶¶ 17-20.

U.S. embassies abroad.[38] Such protests have not only seriously disrupted important diplomatic missions, but have even threatened the physical safety of our U.S. diplomats and embassy staff trying to work in these countries.[39]

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[38] *See* Knowlton, *supra* note 30 (documenting intense media attention in Mexico); Nickerson, *supra* note 29 (describing execution of Stanley Faulder as a "cause celebre . . . dominating front pages and television newscasts" in Canada); Stout, *supra* note 35 (citing protest in front of U.S. embassy in Paraguay); *Paraguay Angered by US Execution*, BBC News, Apr. 15, 1998, *available at* http://news.bbc.co.uk/1/hi/world/americas/78602.stm (documenting public outcry and inundation of radio channels in Paraguay with angry calls); Adam E. Jacobs & Mark A. Berman, *Rediscovering the Right to Consul*, NEW JERSEY L.J., Mar. 2, 1998, at 32 (describing demonstration in front of U.S. Consulate in Ecuador); *Texas Executes a Mexican Killer, Raising a Furor Across the Border*, N.Y. TIMES, Mar. 26, 1993, at A15 (describing street protests). After Arizona executed Jose Roberto Villafuerte, a Honduran national, 500 Hondurans protested at the U.S. Embassy in Tegucigalpa, and Honduran newspapers reported retaliatory threats against the lives of U.S. citizens in Honduran prisons. Nicaragua Solidarity Network of Greater New York, *Hondurans Protest Execution in the U.S.*, WEEKLY NEWS UPDATE ON THE AMERICAS, Apr. 26, 1998, available at http://www.tulane.edu/~libweb/RESTRICTED/WEEKLY/1998_0426.txt. In 1999, to protest the execution of a Canadian who had been denied his rights under the Vienna Convention, local activists planned demonstrations and other organized protests, including letter-writing campaigns and threatened economic boycotts. *U.N. Official Frets Over Canadian's Texas Execution; Ottawa Steps Up Bid to Spare Albertan Convicted of Murder*, TORONTO STAR, Nov. 26, 1998, at A9; *Texas Embroiled in International Legal Rights Dispute Over Preparations to Execute a Canadian Citizen* (NPR Morning Edition broadcast, Dec. 9, 1998).

[39] During public demonstrations in front of the U.S. embassy in Honduras to protest the execution of a Honduran who had not been given timely access to the consular officials, more than 4,000 U.S. personnel, including diplomatic staff, had to be protected by armed security. *See U.S. Boosts Security in Honduras as Tempers Flare*, REUTERS, Apr. 24, 1998; Stout, *supra* note 35. After the execution of Tristan Montoya, a Mexican who had been denied his rights under the Vienna Convention, Mexicans issued death threats and U.S. tourists were given warnings to stay out of certain areas. Armando Villafranca, *Life and Death Chasm*, HOUS. CHRON., Sept. 28, 1997, at A1.

Indeed, the Secretary of State has written to state governors commenting on the disruption of foreign policy because of the persistent state practice of failing to provide consular notice. Most notably, in 1998, Secretary of State Madeleine Albright (a signatory to this brief, *see supra* note 3) wrote to the Governor of Virginia with regard to Angel Francisco Breard, a Paraguayan national for whom the ICJ granted a nonfinal provisional measure directing the United States to stay his execution because Virginia officials had ignored his Vienna Convention rights.[40] In requesting that the Governor exercise his powers to stay Breard's execution, Secretary Albright explained that she was "particularly concerned about the possible negative consequences" of the execution for the many American citizens who live and travel abroad.[41] "The execution of Mr. Breard in the present circumstances," she observed, "could lead some countries to contend incorrectly that the U.S. does not take seriously its obligations under the Convention" and "could be seen as a denial by the United States of the significance of international law and the Court's processes in its international relations and thereby limit our ability to ensure that Americans are protected when living or traveling abroad."[42]

Amici fear that this Court's affirmance of the Fifth Circuit's rejection of the *Avena* judgment would inevitably impair diplomatic relations with our closest allies and promote distrust of our international commitments. In an age where global cooperation is crucial to our nation's security, we cannot afford to allow the several states to exercise a veto over our national obligations and interests under the Vienna Convention and its Optional Protocol.[43]

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[40] Letter from Madeleine K. Albright, U.S. Secretary of State, to James S. Gilmore III, Governor of Virginia (Apr. 13, 1998), *quoted in* Jonathan I. Charney & W. Michael Reisman, *Agora: Breard*, 92 AM. J. INT'L L. 666, 671-72 (1998).

[41] *Id.*

[42] *Id.*

III. FAILURE TO ADHERE TO THE *AVENA* JUDGMENT WOULD ALSO DAMAGE FOREIGN POLICY INTERESTS GOVERNED BY OTHER TREATY REGIMES

The ICJ dispute-settlement provisions in the Vienna Convention's Optional Protocol are not *sui generis*. For that reason, the diplomatic fallout from America's perceived lack of respect for the ICJ and the Vienna Convention cannot be limited to just those settings. *Amici* submit that the failure of the United States to comply with the ICJ's decision in *Avena* would damage a number of existing treaty regimes that ensure the security of our citizens and safeguard our commercial interests, as well as undermine the United States' ability to negotiate new diplomatic covenants. Because "international law is founded upon mutuality and reciprocity," *Hilton v. Guyot*, 159 U.S. 113, 228 (1895), the creation and operation of international dispute-resolution regimes depends largely upon every signatory's good-faith compliance with decisions by these judicial bodies.

After World War II, when international trust and diplomacy were at a low ebb, the United States moved to establish numerous treaties with its former enemies that resolved disputes through binding decisions of the ICJ.[44] This diplomatic strategy of asking friends and foes alike to submit their disputes to binding international dispute-resolution bodies persists to the present day.

In return for our commitment to abide by ICJ judgments, the United States gains not only the cooperation of other states, but also a powerful diplomatic tool for encouraging non-judicial resolution of disputes. Indeed, "[m]any cases are settled before a final judgment is reached," giving the ICJ "an important 'pacifying effect' on disputes at all stages of litigation." Colter Paulson, *Compliance with Final Judgments of the International Court of Justice Since 1987*, 98 AM. J. INT'L L. 434, 436 (2004). Even nations with longstanding histories of extreme hostility toward one another have reached agreement on serious diplomatic disputes after referral (or threat of referral) to the ICJ.[45] This occurred, for example, after the United States inadvertently downed an Iranian civilian airliner, killing 290 passengers and crew. Despite our strained diplomatic relations, Iran sought a peaceful solution by bringing suit before the ICJ, and the parties ultimately were able to negotiate a settlement.[46]

The "mutuality and reciprocity" that forms the foundation of international relations is particularly critical for the effective operation of our nation's commercial and economic treaties. International trade agreements have always been a major component of U.S. diplomatic relations with other nations, but the last half of the twentieth century has witnessed the direct application of such agreements to commercial relationships between individuals and nations.[47]

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[43] Certainly, these concerns are of no less importance today than they have been in the past. As Secretary of State designee Condoleezza Rice stated at her confirmation hearing on January 18, 2005: "The United States will . . . continue to work to support and uphold the system of international rules and treaties that allow us to take advantage of our freedom, to build our economies and to keep us safe and secure." *Transcript: Confirmation Hearing of Condoleezza Rice*, N.Y. TIMES, Jan. 18, 2005, at http://www.nytimes.com/2005/01/18/politics/18TEXT-RICE.html; *id.* ("We must use American diplomacy to help create a balance of power in the world that favors freedom. The time for diplomacy is now.").

[44] *See, e.g.*, Treaty of Friendship, Commerce and Navigation, Feb. 2, 1948, U.S.-Italy, art. XXVI, 63 Stat. 2255, 2294, 79 U.N.T.S. 171, 212; Treaty of Friendship, Commerce and Navigation, Oct. 29, 1954, U.S.-F.R.G., art. XXVII, 7 U.S.T. 1839, 1867, 273 U.N.T.S. 3, 36; Treaty of Peace with Japan, Sept. 8, 1951, art. 22, 3 U.S.T. 3169, 3188-89, 136 U.N.T.S. 45, 72.

[45] *See, e.g.*, Trial of Pakistani Prisoners of War (Pak. v. India), 1973 I.C.J. 328 (July 13), and 1973 I.C.J. 347 (Dec. 15) (dispute settled out of court).

[46] Aerial Incident of 3 July 1988 (Iran v. U.S.), 1989 I.C.J. 132 (Dec. 13), and 1996 I.C.J. 9 (Feb. 22).

Critically, a vast array of agreements dealing with international trade and foreign investment now call for binding arbitration or resort to permanent international tribunals to resolve intractable disputes. Affirmance of the Fifth Circuit in this case might seriously impede the ability of our nation and its citizens to rely upon the international arbitration arrangements in these commercial treaties.

Many important economic treaties vest compulsory jurisdiction before the ICJ, including international sovereign disputes ranging from the international recognition of copyrights[48] and patents[49] to the transport of goods by air.[50] The United States has also agreed to submit to the jurisdiction of other binding arbitration mechanisms to protect U.S. trade and investment interests. Of most recent significance to commercial interests is Chapter 11 of the North American Free Trade Agreement (NAFTA),[51] and the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) of the World Trade

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[47] *See, e.g., Republic of Austria v. Altmann*, 541 U.S. 677 (2004) (finding no sovereign immunity bar to suit by individual against sovereign nation regarding expropriation of private property).

[48] Universal Copyright Convention, *opened for signature* Sept. 6, 1952, art. XV, 6 U.S.T. 2731, 2743, 216 U.N.T.S. 132, 146.

[49] Patent Cooperation Treaty, *opened for signature* June 19, 1970, art. 59, 28 U.S.T. 7645, 7708, 1160 U.N.T.S. 231, 262.

[50] International Air Transport Agreement, *opened for signature* Dec. 7 1944, art. IV, sec. 3, 3 Bevans 922, 925, 84 U.N.T.S. 389, 394; *see also* Convention on International Civil Aviation, *opened for signature* Dec. 7, 1944, chp. XVIII, art. 84, 3 Bevans 944, 966, 15 U.N.T.S. 295, 352.

[51] North American Free Trade Agreement, chp. 11, Sept. 6, 1992, 32 I.L.M. 605, 639 (1993).

Organization (WTO).[52] Together, NAFTA and the WTO grant private interests and sovereign nations, respectively, compulsory resort to binding arbitral tribunals.

The benefits stemming from these treaties and their binding dispute-resolution mechanisms are not illusory. Since 1996, American investors have initiated arbitral proceedings under NAFTA against the government of Canada eight times, and against the government of Mexico twelve times, with at least five of those cases resulting in compensation for the American investors, while six of the cases remain pending.[53] Similarly, 74 of the 324 disputes that have been initiated before WTO tribunals were brought by the United States as a complainant.[54] However, an unwillingness to honor our treaty commitments in this case would jeopardize the very scheme of international judicial protection our nation is increasingly using to safeguard our individual and national economic interests.

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[52] In the DSU, WTO members agree to submit to binding arbitration of certain trade disputes, and are under an obligation "to have recourse to and abide by the rules and procedures" of the DSU. Understanding on Rules and Procedures Governing the Settlement of Dispute, *entered into force* Jan. 1, 1995, art. 23(1), *in* Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Marrakesh, Apr. 15, 1994, 33 I.L.M. 1125, 1241 (1994).

[53] For a list of past and pending NAFTA Chapter Eleven cases, see NAFTA Investor-State Arbitrations, U.S. Department of State Website, at http://www.state.gov/s/l/c3439.htm (last visited Jan. 10, 2005), and NAFTA-Chapter 11-Investment, Canada Department of Foreign Affairs and International Trade Website, at http://www.dfait-maeci.gc.ca/tna-nac/NAFTA-en.asp (last updated Jan. 22, 2004).

See also Dep't of Transportation v. Public Citizen, 124 S. Ct. 2204, 2211 (2004) (recognizing U.S. adherence to the decision of a NAFTA arbitration panel); *Canada v. S.D. Myers, Inc.*, 2004 Fed. C.C. LEXIS 20, at *15, *16 (Fed. Ct. Jan. 13, 2004) (affording a "high level of deference" to a NAFTA Tribunal in affirming a $7 million award to an American investor against the Canadian government, "so as to be sensitive to the need of a system for predictability in the resolution of disputes").

[54] *See, e.g., European Communities—Regime for the Importation, Sale and Distribution of Bananas*, WTO Doc. Series WT/DS27, and *European Communities—Measures Concerning Meat and Meat Products (Hormones)*, WTO Doc. Series WT/DS26 & WT/DS48. For a list of past and pending DSU cases, *see* http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm (last updated Jan. 10, 2005).

In sum, *Amici* submit that the continuing ability of the United States to secure international treaty regimes that are critical to the realization of our national interests throughout the world, and to secure reliable enforcement of those regimes already in place, depends directly upon our reputation for honoring the international obligations that we undertake. *Amici* believe that the practice of some of the several states in ignoring our obligations under the Vienna Convention and Optional Protocol presents a serious problem in this regard—one to which this Court should put an end.[55]

CONCLUSION

For the foregoing reasons, *Amici* urge the Court to reverse the decision below.

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[55] In doing so, this Court will also help ensure that the Vienna Convention is consistently interpreted and uniformly applied by all signatories—which is one of the principle goals of nations in entering treaties in the first place. *See also* Transcript: A Conversation on the Relevance of Foreign Law for American Constitutional Adjudication with U.S. Supreme Court Justices Antonin Scalia & Stephen Breyer, Jan 13, 2005, at American University School of Law, available at http://wcl.american.edu/secle/founders/2005/050113.cfm (Justice Scalia stating, "[T]he object of a treaty being to come up with a text that is the same for all the countries, [the U.S. courts] should defer to the views of other signatories, much as we defer to the views of the agencies—that is to say, if it's within the ballpark, if it's a reasonable interpretation, though not necessarily the very best.").

Respectfully submitted,

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Jeffrey Davidow is the president of the Institute of the Americas at the University of California, San Diego. He served as U.S. Ambassador to Mexico from 1998 to 2002, under both President Clinton and President Bush, and as U.S. Ambassador to Zambia (1988-1990), and Venezuela (1993-1996). From 1996 to 1998, he was assistant Secretary of State for Inter-American Affairs. After 34 years in the State Department, he retired with the personal rank of Career Ambassador.

Herbert J. Hansell served as the Legal Adviser of the U.S. Department of State from 1977 to 1979, Member of the Permanent Court of Arbitration, The Hague, from 1978-1980, and Senior Adviser and Ambassador to the Mideast Peace Negotiations in 1980. He served as Adviser to the United States Trade Representative on international investment in 1980, and as Adviser to the American Law Institute Restatement of the Foreign Relations Law of the United States. He is also Retired Partner at the law firm of Jones Day.

James R. Jones is a partner with Manatt, Phelps and Phillips LLC, and National Chairman of the World Affairs Council of America. From 1973 to 1987, he was a member of the U.S. House of Representatives from Oklahoma. During his tenure in Congress, he was Chairman of the House Budget Committee and a ranking member of the Ways and Means Committee. From 1989 to 1993, he was Chairman and Chief Executive Officer of the American Stock Exchange. He served as the U.S. Ambassador to Mexico from 1993 to 1997, and was awarded by President Ernesto Zedillo the Aztec Eagle Award, the highest award that can be given to a non-Mexican.

James C. O'Brien served as Special Presidential Envoy for the Balkans from 2000 to 2001, as Principal Deputy Director of the State Department Policy Planning Staff from 1998 to 2000, and as a State Department official from 1989 to 2001.

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and Executive Secretary of the Department and Special Assistant to the Secretary. He was also President of the Eurasia Foundation.

J. Stapleton Roy is Managing Director of Kissinger Associates, Inc. A Career Ambassador, he served as U.S. Ambassador to Indonesia, U.S. Ambassador to the Peoples' Republic of China, and U.S. Ambassador to Singapore. He also served as Assistant Secretary of State for Intelligence and Research, Executive Secretary of the Department and Special Assistant to the Secretary, and as Deputy Assistant Secretary for East Asian and Pacific Affairs.

Nancy Soderberg is the Vice-President for Multilateral Affairs at the International Crisis Group, and served as Deputy Assistant to the President for National Security Affairs and as the U.S. Ambassador and Representative for Special Political Affairs at the United Nations.

Abraham D. Sofaer is a Senior Fellow at the Hoover Institution, Stanford University, and Professor of Law (by Courtesy) at the Stanford Law School. He served as a federal district judge in the Southern District of New York from 1979 to 1985. From 1985 to 1990 he served as Legal Adviser at the US Department of State.

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Frank G. Wisner is Vice-Chairman of the American International Group. A Career Ambassador, he served as U.S. Ambassador to India, U.S. Ambassador to the Philippines, U.S. Ambassador to Egypt, and U.S. Ambassador to Zambia. He also served as Under Secretary of Defense for Policy, Under Secretary of State for International Security Affairs, and Senior Deputy Assistant Secretary of State for African Affairs.

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IN THE
Supreme Court of the United States

JOSE ERNESTO MEDELLIN,

Petitioner,

v.

DOUG DRETKE, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF *AMICUS CURIAE* OF THE GOVERNMENT OF THE UNITED MEXICAN STATES IN SUPPORT OF PETITIONER JOSE ERNESTO MEDELLIN

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INTEREST OF AMICUS CURIAE[1]

By signing and ratifying the Vienna Convention on Consular Relations, *opened for signature* Apr. 24, 1963, 21 U.S.T. 77, the Government of Mexico and the Government of the United States made commitments to each other, to their other treaty partners, and to the rule of law. Specifically, the United States promised that detained Mexican nationals would be promptly notified of their right to seek consular assistance, and that Mexico would be permitted to provide consular protection to those nationals. In turn, Mexico promised to extend those same rights to the United States and its nationals detained in Mexico. And by signing and ratifying the Optional Protocol to the Vienna Convention, the Government of Mexico and the Government of the United States agreed that irreconcilable disputes over the interpretation and application of the treaty's provisions would be resolved by the International Court of Justice ("ICJ"). Optional Protocol Concerning the Compulsory Settlement of Disputes, art. 1, *opened for signature* Apr. 24, 1963, 21 U.S.T. 325.

On March 31, 2004, the International Court of Justice rendered its judgment in *Avena and Other Mexican Nationals*. The ICJ held that the United States had violated the rights of Mexico and of Mr. Medellín under Article 36 of the Vienna Convention. As a remedy for those violations, the ICJ held that the United States must provide Mr. Medellín with meaningful review and reconsideration of his conviction and sentence that gives full effect to the purposes of Article 36. Despite the ICJ's judgment, the Court of Appeals below refused even to grant a certificate of appealability to review Mr. Medellín's claims under the Vienna Convention and the Avena judgment, brushing aside the legal obligation of the United States to abide by the remedial decree entered against it in an international adjudicative proceeding that it had agreed by treaty to accept as binding.

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[1] No person or entity other than the Government of Mexico or its counsel made a monetary contribution to the preparation or submission of this brief. Counsel for Petitioner has not authored this brief in whole or in part. Petitioner and Respondent have each consented in writing to the filing of this amicus brief.

Mexico has a direct interest in compliance by the United States with the *Avena* judgment. The very purpose of Article 36 is to permit the nations that signed the Vienna Convention – including Mexico, the United States, and 164 other countries – to protect the interests of their citizens when they are arrested or otherwise detained while living, working, or traveling abroad. That interest is most acute when a citizen is facing trial in another country for a crime that may lead to his execution.

SUMMARY OF ARGUMENT

When Mexico and the United States agreed to submit to the jurisdiction of the International Court of Justice, both parties recognized that they would be bound by the Court's final judgment. The two countries are both party to over 50 instruments that provide international dispute resolution mechanisms.[2] Indeed, over the last two centuries, Mexico and

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[2] The subject matter of these treaties encompasses topics as diverse as taxation, *see* Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, Sept. 18,

the United States have settled hundreds of disputes in this manner.[3] While the facts of the cases, the composition of the tribunals, and the rules of procedure have differed, each country has consistently recognized that when it commits itself to resolve a dispute by submitting to the jurisdiction of an international tribunal, it agrees to be bound by the result.

In recent years, Mexico and the United States have disagreed on the scope of the rights established by Article 36. After the two nations failed to resolve their differences through diplomatic channels, Mexico exercised its right to submit the dispute to the International Court of Justice for binding resolution. In doing so, Mexico expressly invoked the rights of its nationals and sought specific remedies on their behalf in its exercise of diplomatic protection. The ICJ weighed the arguments of the parties and the facts of each Mexican national's case, and issued a carefully reasoned judgment

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1992, U.S.-Mex., art. 26, 1992 U.S.T. LEXIS 193; copyrights, *see* Universal Copyright Convention, *opened for signature* Sept. 6, 1952, art. XV, 6 U.S.T. 2731; narcotics, *see* United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, *opened for signature* Dec. 20, 1988, art. 32, 1988 U.S.T. LEXIS 194, *80-81; pollution, *see* International Convention for the Prevention of Pollution of the Sea by Oil, *opened for signature* May 12, 1954, art. XIII, 12 U.S.T. 2989; aviation, *see* Air Transport Agreement Between the Government of the United States of America and the Government of the United Mexican States, Aug. 15, 1960, art. 13, U.S.-Mex., 12 U.S.T. 60; and chemical weapons, *see* Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, *opened for signature* Jan. 13, 1993, art. XIV, 14 U.N.T.S. 45.

[3] For a partial list of arbitrations to which each country has submitted, *see* A.M. STUYT, SURVEY OF INTERNATIONAL ARBITRATIONS 653, 636-37 (1990).

adjudicating the rights of Mr. Medellín and 51 other Mexican nationals, thereby settling the dispute that had, at times, strained relations between the two nations.

Under both international and United States law, the *Avena* judgment constitutes a binding adjudication of Mr. Medellín's rights that the United States must fully implement. Mexico respectfully requests that this Court correct the judgment of the Court of Appeals and instruct the lower courts of the United States to comply with the judgment of the International Court of Justice.

ARGUMENT

I. The United States and Mexico Have Consistently Recognized That When a Dispute Is Submitted by Mutual Consent to an International Tribunal, the Resulting Judgment Is Binding.

As neighbors and trading partners, the United States and Mexico have an extraordinarily close relationship. Inevitably, the two nations have differed on matters ranging from boundary lines and trade practices to the treatment of each country's nationals. When such disagreements have arisen, Mexico and the United States have attempted to resolve them amicably, often through arbitration. Arbitration has staved off armed conflict,[4] resolved boundary disputes,[5] and indemnified private investors[6] as well as individuals who claimed personal injury[7] or denial of due process.[8] Both countries have benefited from international arbitration of their disputes. This may explain why "the history of the relations between the United States and Mexico shows a constant endeavor to resort to this means of settlement." A.H. FELLER, THE MEXICAN CLAIMS COMMISSIONS 1 (1935).

Conflicts over the treatment of United States citizens in Mexico were a recurring theme in early diplomatic relations between the two countries. DUNN, *supra*, at 1-2. In the mid-nineteenth century, United States citizens flocked to Mexico in great numbers. FELLER, *supra*, at 1. Many complained they were subjected to unequal treatment, illegally detained, deprived of due process, or otherwise wronged by Mexican authorities.[9] They sought protection from the United States government, which in turn pressed their claims upon the Government of Mexico. *See, e.g.*, DUNN, *supra*, at 18-19. The frequency with which such claims were brought by the United States against Mexico led one commentator to observe that

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[4] *See, e.g.*, FREDERICK DUNN, THE DIPLOMATIC PROTECTION OF AMERICANS IN MEXICO 10-27 (1933).

[5] *See* U.S. Boundary Relations, 3 Whiteman DIGEST §30, at 680-84 (1964) (describing the agreement of the United States to abide by the terms of arbitral judgment regarding disputed tract of land known as "El Chamizal" in El Paso, Texas).

[6] *See Metalclad Corp. v. United Mexican States*, ICSID Case No. ARB(AF)/97/1 (ICSID AF) (Aug. 30, 2000) [hereinafter *Metalclad*"].

[7] *See Francisco Quintanilla* (Mexico v. United States), Opinions of the Commissioners 136 (1926).

[8] *See* JOHN BASSETT MOORE, 4 INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY 3251 (1898).

[9] *See generally id.* at 3235-3252.

"[t]he subject of the claims of foreign nationals plays a more important role in the history of the foreign relations of Mexico than in that of any other country." FELLER, *supra,* at 1.

Diplomacy proved unable to resolve these disputes, and the unsettled claims of United States citizens in Mexico were cited as justification for war with Mexico in 1846. *See* DUNN, *supra*, at 45-49. After the war, United States citizens continued to allege mistreatment by Mexican authorities. This time, the two nations signed the Claims Convention of 1868, which established a Commission to hear the claims of both Mexican and United States citizens for property damage, personal injury, and wrongful detention.[10] Convention Between the United States of America and the Republic of Mexico for the Adjustment of Claims, July 4, 1868, U.S.-Mex., art. II, 115 Stat. 679, 681. After reviewing more than 2,000 claims, the Commission entered judgments against Mexico totaling over $4,000,000.00, a sum far greater than that assessed against the United States. FELLER, *supra,* at 6. Mexico promptly complied with the Commission's judgment. *See Frelinghuysen v. United States ex rel. Key,* 110 U.S. 63, 67 (1884) ("the government of Mexico has promptly and in good faith met its annual payments"); DUNN, *supra*, at 112.

Mexico never disputed its legal obligation to comply with the judgments of the 1868 Claims Commission, even in the face of compelling evidence that some claims were fraudulent.[11] *See La Abra Silver Mining Company v. United States,* 175 U.S. 423, 458 (1899); *Frelinghuysen,* 110 U.S. at 67 (1884). In *Frelinghuysen*, the Court accepted that the judgments of arbitral tribunals "are final and conclusive until set aside by agreement between the two governments." 110 U.S. at 67. The Court further observed that "Mexico cannot, under the terms of the treaty, refuse to make the payments at the times agreed on if required by the United States. This she does not seek to do." *Id.* at 467-68.

Mexico and the United States have also resorted to international arbitration to resolve economic disputes. In the case of the Pious Fund of California, the Claims Commission awarded the Catholic church of California the sum of $904,070.79, which Mexico paid in full. REPORT OF JACKSON H. RALSTON, IN THE MATTER OF THE CASE OF THE PIOUS FUND OF THE CALIFORNIAS 5 (1902). But the matter did not end there. The United States contended that Mexico owed additional interest on the fund,[12] and in an attempt to resolve the dispute, both nations agreed to submit to the jurisdiction of the

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[10] *See, e.g.,* MOORE, *supra,* at 3243-44 (describing the wrongful imprisonment claim of A.H. Halstead, which resulted in an arbitral judgment of $1,600.00); *id.* at 3247 (describing the arbitrary detention claim of William P. Barnes, resulting in arbitral judgment of $5,100.00); *id.* at 3251 (describing the wrongful detention claim of Augustus Jonan, resulting in arbitral judgment of $35,000.00 in Mexican gold).

[11] Article 2 of the Claims Convention provided that "[t]he president of the United States. . . and the president of the Mexican republic hereby solemnly and sincerely engage to consider the decision of the commissioners conjointly, or of the umpire, as the case may be, as absolutely final and conclusive upon each claim decided upon by them or him respectively, and to give full effect to such decision without any objection, evasion, or delay whatsoever." 15 Stat. 679.

[12] *Reports of International Arbitral Awards*, v. IX at 5, U.N. Sales No. 59.V.5 (1948).

Permanent Court of Arbitration at The Hague.[13] The Pious Fund case was the first judgment issued by the newly-established tribunal. HOWARD N. MEYER, THE WORLD COURT IN ACTION: JUDGING AMONG THE NATIONS 24 (2002). The Permanent Court of Arbitration issued a unanimous judgment against Mexico on October 14, 1902. Mexico was ordered to pay a lump sum of $1,460,682.67, and to make annual payments of $43,050.99 in perpetuity. RALSTON, *supra,* at 15-16. Mexico complied with the judgment, which has now been paid in full. *See* FRANCIS J. WEBER, THE UNITED STATES VERSUS MEXICO: THE FINAL SETTLEMENT OF THE PIOUS FUND 53 (1969).

The commitment of both nations to peaceful dispute resolution through arbitration wavered only once, and the results were disastrous. In 1910, the United States and Mexico agreed to arbitration to resolve a long-running border dispute in El Paso, Texas. Convention for the Arbitration of the Chamizal Case, June 24, 1910, U.S.-Mex., 36 Stat. 2481. The Convention established that the decision of the arbitral commission would be "final and conclusive upon both Governments, and without appeal." 36 Stat. 2483. Nevertheless, when the Commission awarded a large portion of the disputed tract to Mexico, the United States refused to comply with the judgment. ALAN C. LAMBORN & STEPHEN P. MUMME, STATECRAFT, DOMESTIC POLITICS, AND FOREIGN POLICY MAKING: THE EL CHAMIZAL DISPUTE 54-55 (1988).

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[13] *See* Protocol for the Adjustment of Certain Contentions Arising Under What is Known as the "Pious Fund of the Californias," May 22, 1902, U.S.-Mex., 9 Bevans 12, 1902 U.S.T. LEXIS 50. Article XIV of the Protocol provided that "the award ultimately given hereunder shall be final and conclusive as to the matters presented for consideration."

The effects of this decision upon bilateral relations were "significant and lasting," and the United States' refusal to comply became "an integral part of almost every diplomatic issue arising between the two nations" for the following 52 years.[14] SHELDON B. LISS, A CENTURY OF DISAGREEMENT: THE CHAMIZAL DISPUTE 30 (1965). In addition to souring relations between the two countries, *see id.* at 77, the United States' reaction to the judgment led Mexico to reject arbitration as a method of resolving disagreements with United States and British oil companies after President Lázaro Cárdenas nationalized the Mexican oil industry in 1938. *Id.* at 75, 100. In addition, it led Mexico to temporarily suspend its compliance with the Pious Fund judgment entered by the Permanent Court of Arbitration.[15] *See* LAMBORN AND MUMME, *supra,* at 171; ANTONIO GÓMEZ ROBLEDO, MEXICO Y EL ARBITRAJE INTERNACIONAL 101 (1965).

In 1963, the United States finally recognized the Chamizal arbitral award. *See* LISS, *supra,* at 89. In announcing the decision to comply with the Commission's judgment, President Kennedy acknowledged the United States had been wrong in rejecting the award. *See* President's Message to the Senate Transmitting the Convention for the Solution of the Problem of the Chamizal, 88th Cong. 1-3 (1963); *Transcript of the President's News Conference on Foreign and Domestic Matters*, N.Y. TIMES, July 6, 1962, at A8. And notwithstanding the request of Texas Senator John Tower that the matter be submitted to the Texas legislature for approval,[16] the United States ratified a new treaty giving effect to the judgment. Convention for the Solution of the Problem of the Chamizal, U.S.-Mex., Aug. 29, 1963, 15 U.S.T. 21.

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[14] In 1925, the United States rejected Mexico's suggestion that the dispute be submitted to the Permanent Court of International Justice (the precursor to the International Court of Justice) for arbitration. Since the United States did not accept the jurisdiction of the international tribunal, the Court had no power to resolve the dispute. *See Convention With Mexico for Solution of the Problem of the Chamizal: Hearings Before the Committee on Foreign Relations, United States Senate*, 88th Cong. 21 (1963) (statement of Ambassador Thomas C. Mann) [hereinafter "Chamizal Hearings'].

[15] *See* Weber, *supra,* at 42. Mexico suspended payments on the Pious Fund in 1915. In 1966, it resumed payments, *id.* at 51, and fully satisfied its obligations in 1967. *Id.* at 53.

Since then, the United States and Mexico have submitted numerous economic disputes to international tribunals for resolution. And in the early 1990s, both nations signed and ratified the North American Free Trade Agreement, which provides unprecedented opportunities for arbitration of disputes between states and private investors. Dec. 17, 1992, U.S.-Can.-Mex., 32 I.L.M. 289-397, 605-779. In *Metalclad v. Mexico*, an arbitral tribunal awarded a United States-based corporation $16.685 million in damages. *Metalclad,* supra n. 6. Although Mexico had vigorously contested Metalclad's claims, it complied with the judgment. Explaining its decision to pay Metalclad in accordance with the tribunal's decision, Mexico reaffirmed its commitment to honor its international obligations, "even when it does not agree with the findings of the international tribunal nor with the way the tribunal works." *Eye on Investors, Mexico Pays U.S. Company,* N. Y. TIMES, Oct. 29, 2001, at A4.

As the examples above make clear, both the United States and Mexico have long understood that when a dispute is submitted by mutual consent to an international tribunal for resolution – as under the Optional Protocol to the Vienna Convention – the resulting judgment is final and binding.

II. The Protection of Nationals Abroad Has Long Been a Priority of Both Mexico and the United States.

Ever since Mexico and the United States established diplomatic relations, the two countries have been actively involved in the protection of their nationals within the other's territory. In 1943, the two countries signed a bilateral consular convention that codified the customary rights of consular officers to assist their nationals. Consular Convention Between the United Mexican States and the United States of America, Aug. 12, 1942, U.S.-Mex., art. 6, 57 Stat. 800. Among other things, the bilateral consular convention grants consular officers the right to visit detained nationals, to assist them "in proceedings before or relations with authorities of the State," and to "address the authorities, National, State, Provincial or Municipal, for the purpose of protecting the nationals of the State by which they were appointed in the enjoyment of rights accruing by treaty or otherwise." *Id.* The bilateral convention did not contain any provision for arbitration of disputes; instead, article 6 provides that grievances may be addressed through diplomatic channels. *Id.*

The 1963 Vienna Convention on Consular Relations reaffirmed the rights set forth in the Bilateral Convention and elaborated on the types of services consular officers could provide. Vienna Convention, arts. 5, 36. For example, article 5(i) of the Vienna Convention states that "Consular functions consist in: ... representing or arranging appropriate representation for nationals of the sending State before the tribunals and other authorities of the receiving State." Article 36(1)(c) reinforces this provision, expressly stating that consular officers may "arrange for [the] legal representation" of detained nationals. Significantly, the Optional Protocol to the Vienna Convention gave states parties an additional avenue for dispute resolution that was unavailable under the bilateral consular convention. The United States was the leading proponent of this instrument,[17] which provides:

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[16] *See Chamizal Hearings* at 26 (statement of Senator John G. Tower).

> Disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol.

Optional Protocol, art. 1.

Within the framework of these two conventions, both nations have developed comprehensive programs of consular assistance to their nationals abroad.

A. Mexico Has an Active and Longstanding Tradition of Providing Extensive Consular Services to Its Nationals.

Mexican consular officers have provided services to detained Mexican nationals in the United States for nearly two hundred years. And as the population of Mexican nationals in the United States has expanded, Mexico's consular assistance program has become increasingly sophisticated. With 45 consulates, Mexico now has the most extensive consular network of any foreign nation in the United States.[18]

Mexico's commitment to the protection of its nationals stems in part from its conviction, born of experience, that most Mexican nationals are poorly equipped to navigate the legal system of a foreign country. *See* Memorial of Mexico (Mex. v. U.S.), 2003 I.C.J. Pleadings (Avena and Other Mexican Nationals) A39, App. 7 (June 20, 2003) (Declaration of Roberto Rodríguez Hernández).[19] Many Mexican nationals have little formal education and are desperately impoverished. 2A, para. 6. They have trouble grasping abstract legal concepts, and often fail to understand their rights – even after their lawyers have attempted to explain them. *See id.* at para. 5. Significant cultural and linguistic barriers impede their ability to communicate effectively with their attorneys and to participate fully in their defense. *Id.*

Mexican consular officers have observed that even nationals who have resided in the United States for many years retain a strong connection with Mexican culture. Some never learn to speak English fluently. *See id.* They face problems assimilating to a foreign culture in which they are not fully accepted. As one commentator has observed,

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[17] *See Summary Records of Plenary Meetings and of the Meetings of the First and Second Committees,* U.N. Conference on Consular Relations, at 249, U.N. Doc. A/CONF.25/16 (1963).

[18] Japan has the second largest consular network, with 19 consulates. Canada has only 15 consulates in the United States. U.S. DEPARTMENT OF STATE, CONSULAR NOTIFICATION AND ACCESS, FOREIGN EMBASSIES AND CONSULATES IN THE UNITED STATES (available at http://www.travel.state.gov/law/consular/consular_745.html) (last visited Jan. 17, 2005).

[19] The declaration of Ambassador Rodríguez Hernández was provided to the International Court of Justice in *Avena,* and is appended to this brief. For ease of reference, citations will refer to the appropriate paragraph and page number of the appendix.

> Mexican immigrants come to the United States to face grossly incorrect perceptions, negative stereotypes, both malignant and benign prejudices, hostility, and antipathy.

J. Palerm, B.R. Vincent, and K. Vincent, *Mexican Immigrants in Courts, in* IMMIGRANTS IN COURTS 96 (Joanne Moore, ed., 1999). Consular assistance can often help overcome these unique disadvantages.

Cultural misunderstandings and linguistic barriers pervade many cases involving Mexican nationals, but these factors take on added significance when the national is facing capital punishment. Given the gravity of the penalty at stake, the Government of Mexico has instructed consular officers to monitor capital cases with particular care. 2A, para. 4. Consular staff receive specialized training so that they can evaluate the quality of the legal representation in each case. 6A at para. 16. The archives of the Foreign Ministry contain files reflecting the involvement of consular officers in death penalty cases in the United States dating back to at least 1920.[20]

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[20] *See also Torres v. State,* No. PCD-04-442 (Okla. Crim. App. May 13, 2004), Petition for Writ of Certiorari at 155A (Chapel, J., concurring) (noting that Mexico has had a tradition of active consular assistance in capital cases since the 1920s); *Two Mexicans Die in Electric Chair,* N.Y. TIMES, Jan. 28, 1921, at A3 (discussing unsuccessful battle of Mexican consular officers to prevent executions in New York); William Aceves, *The Vienna Convention on Consular Relations: A Study of Rights, Wrongs and Remedies,* 31 VAND. J. TRANSNAT'L L. 257, 272 n.2 (1998) (citing a 1934 case in which Mexican consular officials sought access to a national held in a California jail); Raymond Bonner, *U.S. Bid to Execute Mexican Draws Fire,* N.Y. TIMES, Oct. 26, 2000, at A20 (describing consular involvement in a Florida capital prosecution, and noting Mexico's reported involvement in 261 death penalty cases since 1994); *Valdez v. State*, 46 P.3d 703, 710 (Okla. Crim. App. 2001) (concluding that Mexico would have intervened in a 1989 capital murder prosecution to assist with a Mexican national's defense and to provide resources to ensure that the defendant received a fair trial and sentencing hearing).

Consular officers provide crucial services to Mexican nationals who are facing the death penalty. In accordance with their training, their principal concern is to ensure the defendant receives qualified and effective legal counsel. 4A, para. 10. Over time, Mexico has concluded that the attorneys assigned to represent Mexican nationals often lack the experience and the resources necessary to provide a vigorous defense. In addition, most of the assigned lawyers do not speak Spanish and rarely enjoy access to Spanish-speaking investigators and experts. Even when the national speaks English fluently, his family usually does not. Thus, counsel's inability to speak Spanish presents a substantial impediment to obtaining mitigating evidence from relatives. And invariably, birth records and other critical documents can only be obtained in Mexico.

Consular officers are therefore instructed to support the defense by providing funds for investigators and experts; acting as a "cultural bridge" between the defendant and his lawyer; communicating with the defendant's family members, friends and others who may be able to offer assistance or information vital to the defense; tracking down records and other documents; and identifying and transporting family members and other witnesses to the United States. 4A-5A, paras. 11-13. If consular officers conclude that the defense attorney is not able to provide high quality representation, they attempt to secure more effective legal counsel, a function that is entirely consistent with the rights of consular officers under article 36(c) of the Vienna Convention:

> Sometimes this is accomplished by providing funds so that experienced counsel may be retained. On other occasions, Mexican consular officers assist in locating experienced defense counsel who are able to represent nationals on a *pro bono* basis. Sometimes, consular officers can persuade judges to remove an unqualified lawyer and appoint more qualified counsel to replace him.

6A, para. 15.

Experience has taught the Government of Mexico that consular intervention is most effective prior to trial. Early consular intervention often persuades prosecutors to refrain from seeking the death penalty. 5A at para. 14. Consular officers commonly search all archives and databases in Mexico to determine whether a defendant has a criminal record, and provide documentation of such searches to the prosecution. Consular officers can also obtain birth, school and medical records that provide proof of a defendant's physical or mental condition. *Id.* at para. 12. This sort of evidence has influenced the outcome of dozens of cases. Statistics maintained by the Mexican Foreign Ministry demonstrate that in at least 59 cases since September 2000 where consular officers were informed of the Mexican national's detention prior to trial, prosecutors

waived the death penalty.

Finally, early intervention enables consular officers to advise Mexican nationals and their counsel of the importance of challenging at the trial level violations of the Vienna Convention. Criminal attorneys in the United States are often unaware of the obligations imposed by Article 36. As a result, they often fail to assert Vienna Convention claims or preserve them for appeal. Consular officers seek to educate defense attorneys about the significance of the treaty and the vital role of consular assistance. Through these efforts, they can increase the likelihood that Mexican nationals will not be prejudiced by any violation of their Article 36 rights, and that Vienna Convention claims will not be waived. 4A, para. 10.

In light of the services described above, it is not surprising that the United States government has acknowledged that the consular assistance Mexico provides its nationals in capital cases is "extraordinary." 1 Counter-Memorial of the United States of America (Mex. v. U.S.), 2003 I.C.J. Pleadings (Avena and Other Mexican Nationals) 186 (Nov. 3, 2003).

B. The United States Has Been a Forceful Advocate for the Consular Rights of American Citizens Detained in Mexico.

United States consular officers have been no less assiduous in seeking to protect the rights of detained United States nationals in Mexico. As a close neighbor and treaty partner of the United States, Mexico fully appreciates that the United States has long been one of the most vigorous advocates of strict compliance with the Vienna Convention. As described above, the United States' inability to resolve complaints by its nationals in Mexico was one of the factors that led to war in 1846. Even after Mexico settled the claims of United States nationals under the Claims Commission of 1868, the United States continued to advocate at the turn of the century for its citizens who claimed that they had been subjected to wrongful detention and denial of due process. *See* DUNN, *supra*, at 308-11, 401.

To resolve these claims, the United States and Mexico ratified a General Claims Convention in 1923. General Claims Convention, Sept. 8, 1923, U.S.-Mex., 43 Stat. 1730. Several of the cases addressed by the Commissioners made reference to the efforts of United States consular officers to protect the rights of their detained nationals. *See, e.g., Harry Roberts* (United States v. Mexico), Opinions of the Commissioners 100, 101, 104 (1926); *B.E. Chattin* (United States v. Mexico), Opinions of the Commissioners 422, 446-47 (1926) (Nielsen, Commissioner, concurring). Among the claims adjudicated by the Commission was that of Walter H. Faulkner, who claimed that Mexican authorities had prevented him from communicating with the United States consul for a period of several days. Although the Commission ultimately concluded that the claimant had failed to prove he was deprived of consular access, it held that "a foreigner, not familiar with the laws of the country where he temporarily resides, should be given this opportunity." *Walter H. Faulkner* (United States v. Mexico), Opinions of the Commissioners 86, 90 (1926).

In 1975, complaints by United States citizens incarcerated in Mexico led to congressional hearings. At those hearings, State Department representatives testified at length regarding the rights of United States citizens to seek consular

assistance:

> All of us regard consular protection as an inherent right of every citizen. That right is not affected by evidence or findings of guilt. . . . Providing consular protection to American citizens abroad is a basic historic responsibility of this Department and its consular officers.

U.S. Citizens Imprisoned in Mexico: Hearings before the Subcommittee on International, Political and Military Affairs, Part I, 94th Cong. 16 (1975) (Statement of Leonard F. Walentynowicz). Mr. Walentynowicz observed that in order to fully protect the rights of prisoners and prevent abuses, immediate consular access was critical:

> A particular issue of prime importance is that of denied or delayed consular access. We believe that immediate consular access is the linchpin on which hangs in large measure the solution to many of our problems. With early access to each prisoner we are convinced we can go a long way toward guaranteeing the prisoner against mistreatment and forced statements at the time of arrest, along with making available to him information about responsible legal counsel and judicial procedures.

Id., Part II, at 6. Finally, in keeping with the United States' long tradition of protecting the rights of its citizens in Mexico, the State Department emphasized the need to actively intervene in individual cases to ensure that justice is done:

> [W]e are persuaded that to make progress in protecting the rights of U.S. citizens in Mexico, we must repeatedly present Mexican authorities with the facts, demonstrate how they constitute a violation of Mexican and/or international law and norms, and insist that such violations be corrected and prevented in the future.

Id. at 63.

III. The International Court of Justice Issued a Binding Judgment that Adjudicated the Rights of Individual Mexican Nationals.

As the preceding overview makes clear, disputes over the treatment of Mexican and United States nationals have permeated bilateral relations for the last two centuries. This is hardly surprising, in light of this Court's observation that

> [o]ne of the most important and delicate of all international relationships, recognized immemorially as a responsibility of a government, has to do with the protection of the rights of a country's own nationals when those nationals are in another country.

Hines v. Davidowitz, 312 U.S. 52, 64 (1941). In recent years, Mexico's efforts to protect its nationals have repeatedly been compromised by non-compliance with Article 36 of the Vienna Convention on Consular Relations. 17A-18A, paras. 43-45. Violations of consular rights have been especially troublesome in capital cases. As described above, Mexican consular officers have provided critical resources to aid in the defense of their nationals facing the death penalty since long before the trial of Mr. Medellín. Yet because of widespread noncompliance with Article 36, Mexico has been unable to come to its nationals' aid prior to trial, at the time when consular assistance would be most useful.

Mr. Medellín's case is illustrative. Mexico learned of his detention only after the Texas Court of Criminal Appeals had already denied his direct appeal. Memorial of Mexico, Annex 7, App. A, para. 235. Texas authorities had made no attempt to comply with their Article 36 obligations, even though Mr. Medellín informed them that he was born in Mexico and had not obtained U.S. citizenship. Joint App. at 15; Petition for Writ of Certiorari, App. 165A. Had Mexico learned of Mr. Medellin's detention in a timely manner, it would have been able to provide the range of consular services it routinely makes available to Mexican nationals facing capital charges. These services would have been of particular use to Mr. Medellín, given the several and substantial ways in which his trial attorney's performance, particularly at the sentencing phase of his trial, fell below the high standards of representation that consular officers routinely insist upon. Indeed, trial counsel was suspended from the practice of law for ethics violations during the pre-trial proceedings in Mr. Medellín's case, when he should have been preparing for trial. Memorial of Mexico, Annex 7, App. A, para. 232. The core of counsel's meager, two-hour penalty phase defense was the testimony of a psychologist, Dr. Wendell Dickerson, whom counsel had not asked or enabled to interview Mr. Medellín. S. F. vol. 35 at 294-348. The assigned defense lawyer made no inquiry into Mr. Medellín's life history in order to provide a mitigating explanation for his role in the crime – the most elemental component of effective capital case advocacy. *See Williams v. Taylor*, 529 U.S. 362, 395-97 (2000) (finding counsel ineffective for failing to investigate defendant's background); AMERICAN BAR ASSOCIATION, STANDARDS FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES, Guideline 10.7 (2003).

At the first possible opportunity, Mexican consular officers assisted Mr. Medellín's post-conviction lawyers in raising the violation of the Vienna Convention in state court. Even though Mr. Medellín had not been informed of his article 36 rights at the trial level, and had no reason to know that he should invoke those rights, the state court found that the Vienna Convention claim was procedurally defaulted. Respondent's Proposed Findings of Fact, Conclusions of Law, and Order, No. 675430-A, at 19 (339th Dist. Ct., Tex. Jan. 22, 2001) (Petition for Writ of Certiorari, App. 34A).

The state court's treatment of Mr. Medellín's claim has been replicated in numerous other cases. *See* Memorial of Mexico at 94-95, paras. 227-253. Mexico has repeatedly sought to obtain redress for these nationals in the United States. It has filed *amicus curiae* briefs in state and federal courts, both at the trial and appellate levels. It has filed suit against local authorities. *United Mexican States v. Woods,* 126 F.3d 1220 (9th Cir. 1997). It has obtained an advisory opinion from the Inter-American Court on Human Rights. OC-16/99, Inter-Am. Ct. H.R. (Oct. 1, 1999). And it has repeatedly lodged diplomatic protests with the United States. 12A-15A, paras. 34-39. None of these efforts have succeeded in vindicating the rights of Mexico or its nationals.

By the end of 2002, Mexico concluded that it had reached an impasse. At that point, Mexico decided to assert its rights under the Optional Protocol to seek resolution of the dispute in the International Court of Justice. On January 9, 2003, Mexico invoked the Optional Protocol and brought suit in the ICJ on behalf of Mr. Medellín and other Mexican nationals. *See* Mexico's Application Instituting Proceedings (Mex. v. U.S.), 2003 I.C.J. Pleadings (Avena and Other Mexican Nationals) (Jan. 9, 2003).

In reviewing the claims of Mr. Medellín and the other Mexican nationals, the International Court of Justice was called upon to ascertain the underlying facts of each case and to undertake a legal analysis of the treaty's provisions. Mexico accordingly presented the facts surrounding the violation of the Vienna Convention in each case. Mexico provided, *inter alia,* copies of state and federal court decisions, affidavits, and transcripts relating to violations of Article 36 where available. *See* Memorial of Mexico, Annexes 35-65. In the case of Mr. Medellín, Mexico supplied the International Court of Justice with the Texas trial court's findings of fact and conclusions of law from state post-conviction proceedings,[21] and provided a separate summary of the Texas court's reasons for rejecting Mr. Medellín's Vienna Convention claim. Memorial of Mexico at A-103, Annex 7, para. 238. For its part, the United States presented its own rendition of the facts of each case, made extensive legal arguments, and submitted over 2,500 pages of diplomatic correspondence, judicial opinions, law review articles, affidavits, and transcripts. Regarding Mr. Medellín, the United States submitted an account of state and federal post-conviction proceedings, including a description of how each court had resolved Mr. Medellín's Vienna Convention claim.[22] Counter-Memorial at A-223, Annex 2, App. 38, para. 7.

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[21] Memorial of Mexico, Annex 55.

The ICJ's final judgment reflects its careful consideration of these materials. The Court analyzed the procedural posture[23] and the facts of each case in determining whether the United States had violated its obligations under Article 36. In particular, where the facts were contested, the Court made detailed findings based on the extensive documentary evidence submitted by the parties. *See, e.g.*, *Avena* Judgment at para. 57 (addressing United States' claim that certain Mexican nationals could have dual citizenship); *id.* at paras. 66-74 (evaluating United States' assertions that certain Mexican nationals had claimed to be U.S. citizens upon arrest); *id.* at para. 89 (reviewing facts of one case in response to United States' contention that the authorities had complied with their Article 36 obligations). The Court also distinguished between those cases in which the United States had violated *all* of its obligations under Article 36 – such as the case of Mr. Medellín – and those in which the United States violated only *some* of its provisions.[24] This is most apparent in the Court's discussion of

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[22] This account included a graphic description of the crime for which Mr. Medellín had been convicted, facts regarding Mr. Medellín's schooling in the United States and prior arrest record, an account of his confession, and an explanation of how state and federal courts had concluded (in the alternative) that he had not been harmed by the Vienna Convention violation. Counter-Memorial at A-222-23.

[23] *See, e.g.*, Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 128, para. 20 (Mar. 31) [hereinafter "*Avena* Judgment"] (referring to the different stages of direct appeal and post-conviction review).

[24] For example, in the case of Ramiro Hernández Llanas, the Court concluded that the United States had violated its obligation to inform the

Article 36(1)(c), which provides that consular officers may "arrange for [the] legal representation" of their nationals.

The Court observed that in 16 cases, Mexican consular officers had learned of their nationals' detention before trial, either through notification by United States authorities or by other means, with sufficient time to arrange for their legal representation. *Avena* Judgment, para. 104. In these cases, the Court concluded that the United States had not violated Article 36(1)(c). It recognized that even though the United States had failed to comply with its obligations to notify the 16 nationals of their consular rights "without delay," consular officers had nonetheless been able to provide meaningful assistance to their nationals prior to trial. In the remaining 34 cases, however, including the case of Mr. Medellín, the Court found that the authorities' noncompliance with Article 36, coupled with Mexico's lack of knowledge of the detentions, had effectively prevented consular officers from arranging for legal representation or providing other resources to improve the quality of the defense. *Id.* at para. 106(4).

With regard to Mr. Medellín, the International Court of Justice held that the United States had violated its obligation under Article 36(1) to inform him of his right to consular notification and assistance, as well as the rights of Mexico to communicate with him, render consular assistance, and arrange for his legal representation. *Avena* Judgment at para. 153(4)-(7). To remedy these violations, the ICJ held that the United

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defendant, without delay, of his consular rights. *Avena* Judgment, para. 76. Nevertheless, the Court held that the United States *had* advised the consular post of Mr. Hernández Llanas' detention without delay, in accordance with its obligations under Article 36(1)(b). *Id.* at para. 97.

States had to provide "review and reconsideration" of Mr. Medellín's conviction and sentence by fully assessing the prejudice caused by the Vienna Convention violations. *Id.* at para. 153(9). The ICJ rejected the United States' argument that review and reconsideration could be achieved through the clemency process, holding instead that the review must occur "within the overall judicial proceedings relating to the individual defendant concerned." *Id.* at 141; *see also id.* at 140.

The *Avena* Court set forth specific requirements for effective review and reconsideration. *First,* the *Avena* Court held that procedural default doctrines may not be invoked where it was "the failure of the United States itself to inform" the national of his Article 36 rights that impeded his ability to raise the violation at trial. *Id.* at paras. 112-13. This holding reflects the Court's recognition that when detained nationals are unaware of their treaty rights, and consular officers are effectively precluded from advising them of these rights prior to trial, the defendants may not be blamed for inadvertently waiving Vienna Convention claims.

Second, the ICJ emphasized that review and reconsideration had to be "effective" and "guarantee that the violation and the possible prejudice caused by that violation . . . be fully examined and taken into account:"[25]

> [I]n a situation of the violation of rights under Article 36, paragraph 1, of the Vienna Convention, the defendant raises his claim in this respect not as a case of "harm to a particular right essential to a fair trial" – a concept relevant to the enjoyment of due process rights under the United States Constitution – but as a case involving the infringement of his rights under Article 36, paragraph 1. The rights guaranteed under the Vienna Convention are treaty rights which the United States has undertaken to comply with in relation to the individual concerned, irrespective of the due process rights under United States constitutional law. In this regard, the Court would point out that what is crucial in the review and reconsideration process is the existence of a procedure which guarantees that *full weight* is given to the violation of the rights set forth in the Vienna Convention, whatever may be the actual outcome of such review and reconsideration.

Avena Judgment, para. 139 (emphasis added).

Third, the *Avena* Court explained that review and reconsideration must be conducted by a court that is empowered "to examine the facts, and in particular the prejudice and its causes, taking account of the violation of the rights set forth in the Convention." *Id.* at para. 122. The ICJ clearly contemplated that the United States courts would scrutinize the nature of Mexico's consular assistance and the difference that such assistance could have made in the context of each individual case. *See id.* at para. 104. Although it would be appropriate for the lower courts to consider the issue of prejudice in Mr. Medellín's case in the first instance, Mexico believes that there will not be far to look before prejudice is found.

In short, the Court's final judgment was both cautious and balanced. Although the Court vindicated Mexico's claims that the United States had violated its international legal obligations in the case of Mr. Medellín and 50 other Mexican nationals, the Court rejected several arguments advanced by Mexico. In doing so, it took pains to respect ongoing capital proceedings in the United States. The Court rejected Mexico's request for a remedy that would have obligated the United States to vacate each national's conviction and sentence without inquiring whether the Article 36 violation affected the fairness of the underlying proceedings. Instead, the Court called upon the United States judiciary to provide a fair process by which the Vienna Convention violations could be fully considered and remedied, on a case-by-case basis.

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[25] *Avena* Judgment at para. 138; *see also id.* at para. 131.

IV. The United States Is Obligated to Fully Implement the *Avena* Judgment.

When the United States and Mexico ratified the Vienna Convention on Consular Relations and its Optional Protocol, they exchanged solemn promises to abide by the terms of those instruments. The binding character of the commitment the United States made in the Optional Protocol is reinforced by the United Nations Charter, also ratified by both the United States and Mexico. U.N. Charter, *opened for signature* Jun. 26, 1945, 59 Stat. 1031, T.S. No. 993. By ratifying Article 94(1) of the Charter, the United States expressly agreed to "comply with the decision of the International Court of Justice in any case to which it is a party." U.N. Charter, art. 94, para. 1. And by ratifying Article 59 of the Statute of the International Court of Justice, which forms part of the Charter, the United States expressly agreed that judgments of the Court have "binding force" upon it in cases to which it is a party. Statute of the

International Court of Justice, art. 59, 59 Stat. 1055, T.S. 993.

In keeping with those promises, the United States must now fulfill its obligations to Mr. Medellín, the Government of Mexico, and the International Court of Justice. Without the United States' express consent, the International Court of Justice could not have heard the *Avena* case or rendered its judgment. Having given its consent, and having fully participated in the proceedings, the United States must now abide by the result.

The modest scope of the judgment reflects the Court's respect for the United States judicial system. The ICJ did not mandate the reversal of convictions and death sentences.[26] Indeed, it did not order substantive remedies in any of the 51 cases. Rather, the International Court of Justice called upon the United States to implement the judgment within its existing judicial framework. To satisfy the United States' obligations to comply with the judgment, the courts need only provide full and fair review of the violations in each national's case, in accordance with the criteria set forth by the ICJ.

With respect to the ICJ's judgment regarding the operation of procedural default rules, Mexico fully appreciates this Court's need to consider its earlier decision in *Breard v. Greene*, 523 U.S. 371 (1998). But the petitioner in *Breard*, unlike Mr. Medellín, did not have the benefit of a binding adjudication of his rights by the International Court of Justice at the time he sought review of his Vienna Convention claim.

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[26] While the ICJ did not mandate a particular outcome in any case, it left open the possibility that United States courts could order new trials or sentencing hearings after reviewing the violations.

Mexico initiated proceedings before the ICJ at a time when no Mexican national was facing imminent execution to avoid the situation created by Paraguay's tardy filing before that Court. *See Breard*, 523 U.S. at 378. The binding nature of the *Avena* Judgment is undisputed, unlike the provisional measures order whose legal status was uncertain at the time this Court decided *Breard*. *See* Brief of International Law Experts and Former Diplomats in Support of Petitioner at 6. This difference is crucial, and compels reconsideration of the *Breard dictum* regarding procedural default.

The United States leads by example. Just as it has invoked the rule of law to protect its own nationals abroad, it should abide by the rule of law when the interests of foreign nationals in the United States are at stake. Mexico respectfully requests that this Court uphold the promises the United States made to Mexico and the world community by ordering the review and reconsideration mandated by the International Court of Justice in *Avena*.

CONCLUSION

Amicus curiae the Government of Mexico respectfully urges this Court to reverse the decision of the Court of Appeals.

Respectfully submitted,

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International Court of Justice

Avena and Other Mexican Nationals (Mexico v. United States of America)

DECLARATION OF ROBERTO RODRÍGUEZ HERNÁNDEZ

I, Roberto Rodríguez Hernández, solemnly declare upon my honour and conscience that the following declaration is the truth, and that this declaration is in accordance with my sincere belief:

1. I am the Director General for Protection and Consular Affairs in the Mexican Ministry of Foreign Relations, a position I have held since 2001 under the administration of President Vicente Fox. I currently hold the rank of Ambassador of Mexico.

2. I was educated as a lawyer at Morelos State University in Morelos, Mexico. I am a career foreign service officer, having been in the service since 1977, and have held several positions as Consul of Mexico within the United States, specifically in Arizona, Puerto Rico, California and Texas.

3. In my current post, I am responsible for the oversight of Mexico's far-reaching consular protection program. Over the course of my career, I have, of necessity, become knowledgeable about Mexico's practice of providing extensive consular assistance in capital cases.

The Nature of Mexico's Consular Assistance

4. The Government of Mexico is committed to providing its citizens incarcerated in the United States with the highest level of consular assistance, particularly when they are facing capital charges. In Mexico's experience, early intervention by consular officers can often prevent the imposition of a death sentence.

5. To that end, Mexican consular officers have spent considerable time, energy, and resources on capital cases. In these cases, their overriding concern is to ensure that each national understands the nature of the United States' criminal justice system and otherwise makes informed choices with regard to his rights. Mexican nationals often misapprehend their legal rights, even after living in the United States for years. Most nationals speak Spanish as a first language, and they communicate most effectively with someone who understands Mexican idiomatic expressions and even Mexican slang. There are several Mexican nationals on death row who have lived in the United States for years, yet still do not speak English well enough to converse in that language.

6. Most Mexican nationals facing the death penalty come from extremely poor families, and have limited education. The average educational level of the Mexican nationals listed in Mexico's Application is less than seven years – roughly the equivalent of a primary school education. At least seven of the Mexican nationals on death row have gone to school for less than three years. Many suffer from brain damage and other cognitive impairments stemming from exposure to pesticides, substance abuse, and traumatic head injuries. Others are mentally retarded or mentally ill.

7. Mexican consular officers are specifically trained to recognize mental impairments, and take special care in those cases to explain the national's legal rights so that he does not make poor decisions. In several cases, consular officers have detected signs of mental illnesses or other impairments when the national's attorney had failed to recognize them. At least five Mexican nationals facing the death penalty have been found to be mentally retarded in the last three years alone, after Mexico alerted defense counsel to the need for psychological testing and/or referred defense counsel to competent, bilingual experts: Virgilio Maldonado, Ramiro Ibarra Rubí, José Calderon Palomino, Francisco Gonzalez Reyes, and Daniel Angel Plata. In three of those cases, Mexico provided the necessary funds for testing and/or investigation, since defense counsel had no resources to retain a mental health expert.

8. In my experience, Mexican nationals often trust consular officers more than their own lawyers, due to their shared culture and language, and due to the time consular officers spend with detainees who are facing the death penalty. Frequently, consular officers spend more time with detainees than their lawyers, many of whom do not speak Spanish. For example, in the cases of Ramiro Ibarra Rubí and Daniel Angel Plata, both of whom are on death row in Texas, the lawyers who represented them in state post-conviction proceedings never even met them.

9. Mexican consular officers also ensure that Mexican nationals are generally treated fairly and in a non-

discriminatory manner in the proceedings. Whenever consular officers detect an atmosphere of bias against a Mexican defendant because of his nationality, they are instructed to raise their concerns with the appropriate authorities.

10. In addition, Mexican consular officers make certain that the national receives an adequate legal defense from competent and vigorous defense counsel. Mexico has found that the quality of attorneys representing indigent defendants in the United States is uneven, at best. For this reason, consular officers are instructed to monitor and support defense counsel's efforts, confer regularly with the defendant national and his family, and attend court proceedings. In many cases, Mexican consular officers assist in gathering evidence in preparation for the guilt and penalty phases of capital trials. Also in many of the cases, Mexican consular officers educate defense counsel about the requirements of article 36 of the Vienna Convention and assist counsel in raising violations of article 36 at the appropriate time in the criminal proceedings.

11. Mexico also provides funds for expert and investigative assistance. For instance, Mexican consular officers are often instrumental in locating and funding experts relating to the presentation of "mitigation evidence" on behalf of the national during the penalty phase. Such evidence is invariably crucial in assisting the national to avoid the death penalty. Mexico regularly obtains documents from schools, hospitals, and other institutions in Mexico, conducts searches for criminal records (and provides proof of the defendant's lack of criminal record, where appropriate),

provides logistical support to attorneys traveling in Mexico, and supports their efforts to identify and interview witnesses in our country.

12. In Mexico's experience, it is essential that consular officials begin the process of gathering documents and locating witnesses as quickly as possible, because it may influence plea negotiations and affect trial counsel's decisions to retain mental health experts. Locating witnesses and records in Mexico is often very time-consuming, given the necessity of locating witnesses in remote areas without telephone service, and the difficulty in obtaining visas and providing transportation to indigent witnesses with no independent means of transportation.

13. When given adequate notice, Mexican consular officers routinely obtain visas for defense witnesses living in Mexico, so that they may enter the United States. The consulate often provides funding for the transportation of these witnesses. In some cases, witnesses live in rural areas of Mexico, and have never traveled outside of their own communities. In those cases, employees of the Foreign Ministry have personally escorted the witnesses from their homes to the courthouse in the United States where they will testify.

14. Mexican consular officers closely monitor the cases of Mexican nationals facing the death penalty, and often appear before judges and prosecutors to advocate for the imposition of a lesser punishment. They have played an active role in plea negotiations in several cases, with very positive results. They have, on many occasions, provided interpretation services for defendants and have monitored

the performance of official court interpreters.

15. Finally, consular officers support defendants' attempts to obtain more qualified counsel. Sometimes this is accomplished by providing funds so that experienced counsel may be retained. On other occasions, Mexican consular officers assist in locating experienced defense counsel who are able to represent national defendants on a *pro bono* basis. Sometimes, consular officers can persuade judges to remove an unqualified lawyer and appoint more qualified counsel to replace him.

16. The Mexican Foreign Ministry provides training to all consular officers, on a regular basis, so that they are prepared to provide all of the services outlined above.

17. Mexico's goal is not to interfere with the judicial process in the United States, but rather to ensure its nationals receive the protection to which they are entitled under domestic and international law. Pursuant to this mandate, Mexican consular officers have assisted attorneys in innumerable capital cases. The modes of assistance described above represent Mexico's consistent consular practice in capital cases and that practice has not changed during the period of my service.

Mexico's Historical Consular Assistance

18. My government's involvement in these cases stems from its long-term commitment to the protection of Mexican migrants to the United States. The nearly two century-long history of Mexico's consular presence in the United States

attests to that commitment.

19. The very first reference to the duty of the Mexican consuls to provide protection to Mexican nationals abroad is found in the 1829 governing law of the Mexican foreign service. Subsequently, several laws and regulations governing the Mexican Foreign Service during the nineteenth century included the obligation for Mexican consular agents to provide protection and assistance to fellow nationals abroad.[1]

20. In the first decades of the twentieth century, legislation regulating the Mexican Foreign Service enacted in 1910, 1923 and 1934 expressly established the obligation to protect the rights and interests of Mexican nationals, as one of the main responsibilities of Mexican consular officers.[2]

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[1] Relevant legislation included the 1831 Law on the Establishment of Legations in Europe and America (*Ley sobre el Establecimiento de Legaciones de Europa y America),* 1834 Law on the Establishment of Consulates *(Ley sobre el Establecimiento de Consulados*), 1853 Decree Governing Law of the Mexican Diplomatic Service (*Decreto Ley Organica del Cuerpo Diplomatico Mexicano*), 1865 Governing Law of the Diplomatic Service and Governing Law of the Consular Service (*Ley Organica del Cuerpo Diplomatico y Ley Organica del Cuerpo Consular*), 1871 Regulations to the 1834 Law *(Reglamento a la Ley de 1834*), 1888 Regulating Law of the Diplomatic Service (*Ley Reglamentaria del Cuerpo Diplomatico*) and 1896 Governing Law of the Mexican Consular Service and its Regulations (*Ley Organica del Cuerpo Consular Mexicano y su Reglamento*).

[2] 1910 Governing Law of the Mexican Consular Service (*Ley Organica del Cuerpo Consular Mexicano*), and its regulations, 1923 Governing Law of the Mexican Consular Service and its Regulations (*Ley Organica del Cuerpo*

21. During this period, the consular policy of Mexico was characterized by the promotion of bilateral commerce and the establishment of Mexican consulates, especially in border cities. In addition, during this time, consular protection activities were carried out by consuls in response to the increased migration of Mexican nationals to the United States.

22. Over these three decades, Mexico established the foundation for an extensive and sophisticated program of consular assistance to Mexican nationals residing in the United States. At that time, no treaty existed between the two countries that formalized consular relations. Nevertheless, consular access to nationals in foreign prisons had long been accepted as a rule of customary international law.

23. In 1942, Mexico and the United States signed a Consular Convention memorializing the right of each country's consular officers to "address the authorities, National, State, Provincial, or Municipal, for the purpose of protecting the nationals of the State by which they were appointed in the enjoyment of rights accruing by treaty or otherwise." Consular Convention Between the United Mexican States and The United States of America (1942). This Convention, signed twenty-one years before the Vienna Convention on Consular Relations, codified existing customary law and formalized consular relations between Mexico and the United States.

24. In 1963, Mexico and the United States both attended the Conference on Consular Relations convened by the United Nations General Assembly. The conference culminated with Mexico's signing and ratification of the Vienna Convention on Consular Relations, the most important instrument governing consular relations around the world.

25. Three years later, in 1966, Mexico's Congress approved a new Governing Law of the Mexican Foreign Service (*Ley Organica del Servicio Exterior Mexicano*), which made reference to consular protection activities. The law was expanded and updated in 1982, and again in 1994, 1999, and 2002. Currently, under Article 2(II) of the Law of the Mexican Foreign Service, diplomatic and consular officers are obligated to protect the dignity and fundamental rights of all Mexicans abroad, in accordance with principles of international law. Article 44(I) requires heads of consular missions to protect the interests of Mexico and the rights of Mexican nationals, and imposes a duty to notify the Mexican Foreign Ministry of the condition of Mexican nationals. All of these principles have been part of the law governing the foreign service since 1982.

26. The obligations of Mexican consular officers to protect the rights of nationals are reiterated in the regulations corresponding to the Law of the Mexican Foreign Service (*Reglamento de la Ley del Servicio Exterior Mexicano*). Article 53 of the *Reglamento* establishes the "primary obligation" of protecting the rights of Mexicans abroad, and

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Consular Mexicano y su Reglamento) and 1934 Law of the Foreign Service Governing the Diplomatic and Consular Services and its Regulations (*Ley del Servicio Exterior Organica de los Cuerpos Diplomatico y Consular Mexicanos y su Reglamento*).

requires Mexican consular officers to assist Mexican nationals in their relations with local authorities, advise nationals of their rights and obligations in the foreign state, visit Mexicans who are detained in prisons, and represent those Mexicans who cannot personally defend their interests.

27. By 1981, there were 40 Mexican consulates located in major metropolitan areas throughout the United States. That year, the Mexican Foreign Ministry created a special category of consular officers, whose sole purpose was to protect the rights of Mexican nationals abroad. At the same time, Mexican consulates were given increased budgets for consular assistance. By 1983, every consulate in the United States had at least one consular protection officer.

28. In 1986, the Mexican Foreign Ministry established a Program of Legal Consultation and Defense for Mexicans abroad. The Program sent selected career foreign service officials to American law schools to study the American judicial system. In this way, Mexico began to establish a cadre of consular officers specializing in American law, for the express purpose of assisting American attorneys representing Mexican nationals in complicated legal proceedings. During this time, consular officers also provided assistance to the small but growing number of Mexican nationals facing capital charges.

29. Mexico has continued to make enforcement of the Vienna Convention a priority in its relations with the United States. Indeed, on 7 May 1996, Mexico and the United States signed a Memorandum of Understanding on Consular Protection of Mexican and United States Nationals. In this

document, both nations promised to comply with article 36(1) of the Vienna Convention.

30. In September 2000, Mexico established the Mexican Capital Legal Assistance Program in order to enhance the quality of legal representation provided to Mexican nationals in capital cases, train Mexican consular officers to more effectively assist defense counsel, and to increase compliance with international law. To date, the Program constitutes the sole capital legal assistance program established by a foreign government in the United States. The Program is staffed by ten experienced capital defense lawyers and a paralegal.

31. Since September 2000, Mexican consular officers and Program attorneys together have played a decisive role in preventing the imposition of the death penalty in forty-five cases. In thirty-eight of those cases, prosecutors have agreed to waive the death penalty prior to trial. In four cases, defendants were sentenced to life imprisonment after jury trials. And in three cases, the defendants' sentences were commuted to life in prison.

32. Program attorneys have filed, in the name of Mexico, sixteen *amicus curiae* briefs, and have offered important legal assistance to defense counsel in sixty-seven other cases. Through the Program, Mexico has provided funds for experts, mitigation specialists, or investigators in twenty-two cases.

33. I am familiar with Mexico's efforts in the cases of Felipe Petrona Cabañas, Carlos Jahuey Carillo, Francisco Gonzalez Reyes, Ernesto Baylon Mendoza, Liliana Piña,

Nicolas Solorio Vasquez, and Ernesto Esteban Ramírez Anguiano, and can attest that the description of those cases in Mexico's Memorial is accurate.

Mexico's Diplomatic Demarches In Recent Capital Cases

34. Over the past six years, Mexico has filed diplomatic notes in at least twenty capital cases on behalf of Mexican nationals facing execution in the United States. In my various capacities as Consul of Mexico in Arizona, Deputy Director General of Consular Affairs, and my current position as Director General, I have become familiar with the diplomatic efforts made by the Mexican government on behalf of Irineo Tristan Montoya, Mario Benjamin Murphy, Miguel Angel Flores, Gerardo Valdez and Javier Suarez Medina, as well as the responses of the United States to Mexico's overtures in these cases. The following information augments the facts established by the numerous diplomatic notes filed in these cases by Mexico, as cited in the Memorial.

35. In the case of Mr. Montoya, the United States failed to respond to any of the notes filed by Mexico, even refusing to allow a temporary stay of the execution to consider the acknowledged Vienna Convention violation. Instead, Mr. Montoya was executed by the state of Texas on 18 June 1997 and the United States apologized for the execution on 9 July 1997.

36. In the case of Mr. Murphy, the United States Assistant Secretary for Inter-American Affairs, Jeffrey Davidow, told the Mexican Ambassador to the United States at the time, Mr. Jesus Silva-Herzog, that the United States was of the opinion that the Vienna Convention violation had not affected the outcome of Mr. Murphy's case. In response to this statement, Ambassador Silva-Herzog sent a letter dated 10 September 1997 to the United States, urging the United States to join Mexico in requesting a commutation based on the violation. There was no response by the United States, and Mr. Murphy was executed on 18 September 1997 by the State of Virginia. After Mr. Murphy's execution, the United States apologized to Mexico.

37. In the case of Mr. Flores, Mexico sent diplomatic representatives to meet with the Chairman of the Texas Board of Pardons and Paroles to advocate on behalf of Mr. Flores and press for the review of the acknowledged violation of the Vienna Convention. The governments of Argentina, Chile, Honduras, Panama, Poland, Spain, Switzerland and Uruguay, as well as the European Union, joined Mexico to intervene diplomatically on Mr. Flores' behalf. As before, however, there was no response by the United States. Mr. Flores was executed on 9 November 2000 by the State of Texas, after which the United States issued a formal apology.

38. In the case of Mr. Valdez, Mexico first learned of Mr. Valdez's arrest when one of his relatives contacted the consulate in April 2001, only two months before his scheduled execution date. Upon learning of his impending execution, Mexico retained experienced counsel, an investigator and a bilingual neuropsychologist. Mexico's investigative efforts uncovered new evidence that was

subsequently presented to the Oklahoma Board of Pardons and Paroles. Mexican consular representatives attended the Board's public hearing, at which the Board recommended that Mr. Valdez's death sentence be commuted to life imprisonment. Oklahoma's Governor Frank Keating granted a 30-day reprieve to consider the Board's recommendation at the request of President Vincente Fox. Mexico sent a diplomatic envoy to meet with Governor Keating to discuss the Vienna Convention violation and other aspects of the case. Despite Mexico's efforts and the issuance of the *LaGrand* ruling during the 30-day reprieve, Governor Keating rejected the Board's recommendation and denied clemency. Ultimately, an Oklahoma court vacated Mr. Valdez's death sentence based upon a finding that Mr. Valdez's trial counsel provided deficient legal representation.

39. Finally, in the case of Mr. Suarez Medina, Mexico again sent a diplomatic delegation to communicate its concerns to the Texas Board of Pardons and Paroles as well as the Texas Secretary of State. Again, President Fox communicated directly with the Texas Governor to request a reprieve. The attention received by Mr. Suarez Medina's case was international in scope. In addition to the petition filed in the Inter-American Commission on Human Rights, which issued precautionary measures, diplomatic efforts were made on behalf of Mr. Suarez Medina by Argentina, Brazil, Chile, Columbia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Panama, Paraguay, Poland, Slovenia, Spain, Switzerland, Uruguay, Venezuela, the Holy See, and the European Union. Despite all of these efforts, Mr. Suarez Medina was executed on 14 August 2002 by the State of Texas. In protest, President Fox cancelled his official visit to Texas. The United States has not yet issued a formal apology in Mr. Suarez Medina's case.

Cases Of Mexican Nationals Currently Facing Death Sentences in the United States

40. In my capacity as Director General for Protection and Consular Affairs in the Mexican Ministry of Foreign Relations, I have supervised a review of consular files, court documents, and other records pertaining to each national on death row whose Article 36 rights were violated. Attached to this affidavit as Exhibit A are summaries of the relevant facts revealed in the investigation of each of the 54 capital murder cases named in Mexico's Memorial, including the additional case of Enrique Zambrano Garibi, who has only recently come to my attention as a Mexican national tried, convicted, and sentenced to death in proceedings that did not comport with the Vienna Convention. These summaries are based largely upon Mexico's internal files and selected court documents.

Consulate Survey

41. The Mexican Foreign Ministry is in constant contact with its forty-five consular offices located in the United States regarding the protection of Mexican nationals detained in U.S. jails and prisons.

42. As part of its ongoing efforts to ascertain whether U.S. authorities are complying with Article 36, Mexico has requested information from each of its consulates located in the United States to evaluate the authorities' recent practice on consular notification and access. In response, each of the forty-five consulates[3] provided a qualitative assessment of the authorities' level of compliance with Article 36 in their respective jurisdictions. In addition, the consulates provided concrete examples of Mexican nationals arrested after 27 June 2001,[4] and charged with serious crimes,[5] who were not apprised of their rights under Article 36. The consulates' reports were based upon numerous sources, including arrest reports and other case documentation, interviews with defense attorneys, interviews with the nationals themselves, and interviews with local, state, and/or federal authorities operating in the consulates' respective jurisdictions.

43. Together, the consulates identified no fewer than 102 cases of Mexican nationals arrested on serious criminal charges after 27 June 2001, all of which involved violations of the Vienna Convention. In 89 of the cases, nationals have been charged with homicides. In thirty-six of these cases, Mexican nationals could potentially be sentenced to death. The remaining cases involve charges such as attempted murder, assault, and kidnapping. In each of these cases, there is no record of any notification to the national or the consulate. Instead, the relevant consulates became aware of the cases either through media reports, contact by the detained national's family or friends, and/or by taking the initiative to review weekly arrest lists supplied by law enforcement authorities in order guess at Mexican nationality. Each case is detailed in Exhibit B.

44. The cases cited in Exhibit B by no means represent the entire universe of cases in which the authorities have violated Article 36; indeed, Mexico has purposely excluded cases of documented violations unless they arose in a case involving the most serious crimes, where, if convicted, the national would face a lengthy term of incarceration or the penalty of death.

45. As a general matter, the consulates concluded that compliance with article 36 of the Vienna Convention by the competent authorities of the United States is haphazard, at

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[3] The consulates participating in the survey were: Consulmex Houston*, Consulmex Indianapolis, Consulmex Eaglepass, Consulmex Orlando*, Consulmex Nueva York*, Consulmex Kansas, Consulmex Seattle, Consulmex Douglas, Consulmex Omaha*, Consulmex Laredo, Consulmex San Antonio*, Consulmex Raleigh*, Consulmex Las Vegas*, Consulmex Yuma, Consulmex Sacramento*, Consulmex Oxnard*, Consulmex Atlanta*, Consulmex Calexico, Consulmex San Francisco*, Consulmex Del Rio, Consulmex Detroit*, Consulmex Los Angeles*, Consulmex Dallas* Consulmex San Bernardino, Consulmex Fresno*, Consulmex Albuquerque*, Consulmex Presidio*, Consulmex San Diego*, Consulmex Chicago*, Consulmex Philadelphia*, Consulmex Dallas*, Consulmex Denver, Consulmex Austin*, Consulmex El Paso*, Consulmex Portland*, and [ ]. CHECK THIS.

[4] This was the date of the Court's decision in *LaGrand*.

[5] Serious crime cases were defined as violent felonies in which the national faced either a significant term of imprisonment such as life in prison or the death penalty. The vast majority of the cases involve a charge of first-degree murder.

best. On the whole, eleven consulates[6] report that article 36 compliance is practically nonexistent, twenty-five consulates[7] report mixed compliance, while only eight consulates[8] report that consular notification by competent authorities is routine.[9] A summary detailing the information gathered, categorized by state and consulate, is appended as Exhibit B.

46. The survey also shows that compliance by the relevant authorities depends upon specific factors, including (1) whether local, state, or federal authorities are involved, and (2) the severity of the charge against the detained national. For instance, in the majority of consular districts, federal authorities – particularly immigration authorities – have a better record of notification than their local or state counterparts. This is true even though federal authorities are involved in far fewer serious criminal prosecutions involving Mexican nationals, which arise primarily in local and state jurisdictions. Examples abound of this trend. As detailed in Exhibit B, the Presidio and Detroit consulates

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[6] These consulates are located in Los Angeles, San Jose, Presidio, Las Vegas, Oxnard, Omaha, Detroit, Chicago, Raleigh, Orlando, and Fresno.

[7] The consulates are located in San Bernardino, Santa Ana, Austin, Houston, San Antonio, McAllen, Brownsville, Miami, Portland, Philadelphia, Boston, El Paso, Del Rio, Sacramento, San Francisco, San Diego, Calexico, Albuquerque, New York, Phoenix, Atlanta, Dallas, Kansas, Washington D.C., and Salt Lake City.

[8] These consulates are located in Yuma, Tucson, Nogales, Albuquerque, Seattle, Eagle Pass, Laredo, and Douglas.

[9] One consulate, in Indianapolis, opened in November 2002, and could not provide sufficient data regarding compliance.

indicate that only federal immigration authorities appear to be complying with Article 36. The Las Vegas consulate reports that only the United States Department of Homeland Security and one of the local juvenile detention centers appear to be complying with their obligations.

47. Further, the survey showed that compliance with Article 36 is better in cases involving minor criminal charges. Consulates in Los Angeles, San Antonio, and Sacramento all report that competent authorities are far more likely to provide notification in cases involving minor charges, such as Driving While Intoxicated, than in cases involving serious crimes such as murder.

FURTHER AFFIANT SAYETH NOT.

13/06/2003 /S/

Date Roberto Rodríguez Hernández

Supreme Court, U.S.
FILED
JAN 2 4 2005
OFFICE OF THE CLERK

(14)

No. 04-5928

IN THE
Supreme Court of the United States

JOSE ERNESTO MEDELLIN,

Petitioner,

v.

DOUG DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF INTERNATIONAL LAW EXPERTS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE*

Amici are professors and scholars of law expert in the fields of international law and the application of international law by courts in the United States.[1] (A List of *Amici* is set forth in the Appendix.) *Amici* are experienced in the work of international tribunals, notably the International Court of Justice (ICJ), and include former officials of the U.S. Department of State who have represented the United States at the ICJ. *Amici* seek to present their views concerning the significance of a final judgment of the ICJ interpreting a treaty of the United States in a proceeding in which the United States participated fully, and the respect that should be accorded such an interpretation by courts in the United States, in the context of a petition to allow review and reconsideration of a conviction and death sentence.

Amici limit their submission to questions concerning the ICJ judgment interpreting the consular treaty involved in the present case. They do not take a position on the death penalty as such; indeed, *Amici* occupy diverse points on the spectrum of opinion about the death penalty, as well as on other political controversies. They are united in the view that the United States is bound to comply with the ruling of the ICJ on the treaty at issue here, and that the federal judicial power is the organ to ensure such compliance.

SUMMARY OF ARGUMENT

Petitioner is one of 49 Mexican nationals currently on death row in state courts in the United States, who are covered by the final judgment of the International Court of Justice (ICJ) in *Avena and Other Mexican Nationals* (Mexico v. United States), 2004 ICJ 128. All those covered by *Avena* are similarly situated, in that they were not advised in a timely manner of their rights under the Vienna Convention on Consular Relations to contact the Mexican consular post, and were convicted and sentenced to death without benefit of timely consular services. The ICJ has held that petitioner, as one of the subjects of the *Avena* case, is entitled to review and reconsideration of his conviction and sentence as a remedy for violation of his rights under the Convention.

---

[1] In accordance with Supreme Court Rule 37.6, *Amici* state that no party other than *Amici* and their counsel authored this brief in whole or in part, and no person or entity, other than *Amici* and their counsel, has made a monetary contribution to the preparation or submission of this brief. Both parties have granted consent to the filing of this *amicus curiae* brief. Letters of consent are on file with the Clerk of the Court.

In denying habeas corpus (or even a certificate of appealability of the district court's denial of habeas corpus), the court of appeals believed itself constrained to deny the relief that the ICJ found to be required to redress the treaty violations in *Avena*, because of this Court's decision in *Breard v. Greene*, 523 U.S. 371 (1998). However, when this Court considered Vienna Convention claims of which the ICJ had been seized in *Breard* and in *Federal Republic of Germany v. United States*, 526 U.S. 111 (1999) [*LaGrand*], the ICJ orders in question were provisional remedies of then uncertain legal effect, not final judgments. In contrast, the present case arises from a final judgment, whose binding force is unquestioned.

The ICJ judgment does not require the United States to set petitioner free, or to refrain from carrying out the death penalty, if after full review the courts below were to find that the treaty violation had not affected petitioner's ability to defend himself. What the ICJ judgment requires, and what petitioner requests, is that judicial authorities – state and federal – in the United States provide review and reconsideration of petitioner's conviction and sentence to take account of the treaty violation – a violation that the United States itself does not contest.

The *Avena* case and final judgment resulted from a treaty-based judicial process to which the United States fully consented, in which the United States fully participated, and which binds the United States as a whole. The ICJ judgment interprets a multilateral treaty which protects U.S. nationals abroad as well as foreign nationals here. The United States consented to the jurisdiction of the ICJ to decide this dispute and is obligated under Article 94 of the U.N. Charter, Article 59 of the ICJ Statute, and the Vienna Convention and its Optional Protocol – four treaties in force for the United States – to carry out the ICJ's judgment in *Avena*. These treaties bind both state and federal authorities; their relevant provisions and the ICJ's judgment are directed to matters to be carried out in the ordinary course by domestic courts; and state as well as federal courts are required by the Supremacy Clause of the Constitution to exercise their judicial powers within their respective jurisdictions to carry out these obligations of the United States.

ARGUMENT

I. THE ICJ JUDGMENT ESTABLISHES A TREATY RIGHT TO REVIEW AND RECONSIDERATION OF PETITIONER'S CONVICTION AND SENTENCE.

Petitioner is one of 49 Mexican nationals currently on state death rows who are covered by the final judgment of the International Court of Justice [ICJ] in *Avena and Other Mexican Nationals* (Mexico v. United States), 2004 ICJ 128 [*Avena*]. All those covered by *Avena* are Mexican nationals who were not advised in a timely manner of their rights under the Vienna Convention on Consular Relations, April 24, 1963, 21 U.S.T. 77, T.I.A.S. No. 6820, 596 U.N.T.S. 261 [Vienna Convention], to contact the Mexican consular post after their arrest. They were all convicted and sentenced to death without benefit of their treaty right to timely consular assistance, and the ICJ has held that as a remedy for this treaty violation, they are entitled to review and reconsideration of their convictions and sentences. The lower courts have held petitioner's treaty claim to be procedurally defaulted for federal habeas purposes, notwithstanding the ICJ's binding ruling that the application of a procedural default rule to foreclose consideration of such treaty claims is itself a violation of the Vienna Convention. This Court should clarify the import of a final and binding judgment of an international court establishing the authoritative interpretation and application of a treaty, in respect of persons protected by the treaty whose rights are directly addressed in the judgment.

On June 29, 1993, José Ernesto Medellin Rojas, aged 18, was arrested in Texas and was subsequently charged with murder. Though he told the arresting officer and detaining officials that he had been born in Mexico and was not a U.S. citizen, the authorities did not inform him of his treaty rights at any time before his trial, conviction, and sentencing. In 1994, Medellin was convicted of murder and sentenced to death. Mexican consular officials learned of his detention only after he wrote to them from death row in 1997. Medellin thus had no opportunity to secure help from the Mexican consulate before and during trial. The failure to inform Medellin of his consular rights "without delay" constituted a breach of the Vienna Convention.

The violation of the Vienna Convention in Medellin's case, and the refusal of the Texas courts and federal courts to consider any remedy for this breach of treaty, [2] gave rise to a dispute between Mexico and the United States. As it is entitled to do under the Optional Protocol to the Vienna Convention Concerning the Compulsory Settlement of Disputes, April 24, 1963, 21 U.S.T. 325, T.I.A.S. No 6820, 596 U.N.T.S. 487 [Optional Protocol], Mexico brought an application against the United States before the ICJ. After full briefing by both Mexico and the United States and an oral hearing held in December 2003, the ICJ entered a final judgment that specifically held in respect of Medellin:

> (1) that the United States committed breaches of the obligation . . . to inform detained Mexican nationals of their rights under [Article 36(1)(*b*)], in the case of the following 51 individuals: . . . Medellin (case No. 38) . . . ;
>
> (2) that the United States committed breaches of the obligation . . . to notify the Mexican consular post of the detention of the Mexican nationals listed in subparagraph (1) above . . . ;
>
> (4) that the United States . . . also violated the obligation . . . to enable Mexican consular officers to arrange for legal representation of their nationals in the case of the following individuals: . . . Medellin (case No. 38). . . .

Avena, para. 106. The ICJ has further specifically held that the appropriate reparation for these breaches "consists in the obligation of the United States of America to provide, by means of its own choosing, review and reconsideration" of his conviction and sentence. *Ibid.*, para. 153(9).

Prior to *Avena*, the U.S. District Court for the Southern District of Texas denied Medellin's federal habeas corpus petition, finding that the Vienna Convention claim was procedurally defaulted under "an adequate and independent state procedural rule," and on the alternative ground that under Fifth Circuit precedent the Vienna Convention does not create individually enforceable rights and that no judicial remedy is available for its violation. These district court conclusions of law are inconsistent with *Avena* and merit correction by this Court. In *Avena*, the ICJ explained that while the procedural default rule in itself does not violate Article 36, particular applications of the rule can violate the Convention, namely when a breach of Article 36(1) through failure to inform the individual of his rights precluded the exercise of his or his country's treaty rights. *Avena*, paras. 111-113. The ICJ also held in *Avena* that the Vienna Convention gives rise to individual rights and that a judicial remedy of review and reconsideration of a conviction and sentence is required to redress the violation of such rights. *Avena*, paras. 128-134, 140, 153. *Avena* thus determined Medellin's treaty claim favorably, while his habeas appeal was pending.

After *Avena*, the Fifth Circuit affirmed the district court's denial of relief, finding that notwithstanding *Avena*, it was constrained by this Court's decision in *Breard v. Greene*, 523 U.S. 371 (1998), and by Fifth Circuit precedent, unless and until this Court (or the Fifth Circuit en banc) were to decide otherwise. *Medellin v. Dretke*, 371 F.3d 270 (5th Cir. 2004).

Meanwhile, in another post-*Avena* case, in a post-conviction posture, the Oklahoma Court of Criminal Appeals vacated a conviction and death sentence and remanded the case for review and reconsideration in implementation of *Avena*. *Torres v. Oklahoma*, No. PCD-04-442 (Okla. Crim. App. May 13, 2004). The Oklahoma court in *Torres* correctly followed the authoritative treaty interpretation in *Avena*, while the Fifth Circuit in the present case perpetuated and compounded the treaty violation committed by the Texas authorities and added an independent violation by refusing to give effect to the binding *Avena* Judgment.

---

[2] On March 26, 1998, Medellin filed a state application for habeas corpus, arguing that his conviction and sentence should be vacated as a remedy for the treaty violation. The state court denied the application, finding that the treaty claim had been procedurally defaulted.

This Court should clarify or reconsider its *Breard* per curiam order in the light of the authoritative treaty interpretation established in *Avena* (Section II below), and should confirm the existence of federal judicial power to fulfill the international treaty obligations of the United States - obligations which were voluntarily accepted through proper constitutional processes (Sections III-IV).

II. THIS COURT SHOULD REVISIT ITS PER CURIAM RULING IN *BREARD* IN LIGHT OF THE AUTHORITATIVE INTERPRETATION IN *AVENA* OF THE OBLIGATIONS OF PARTIES TO THE VIENNA CONVENTION ON CONSULAR RELATIONS.

In *Breard*, this Court accepted that it should "give respectful consideration to the interpretation of an international treaty rendered by an international court with jurisdiction to interpret such [a treaty]." 523 U.S. at 375. Nonetheless, in a procedural posture not conducive to plenary consideration of the important issues at stake, the Court went on to interpret Vienna Convention Article 36 in a manner that turned out to be inconsistent with the interpretation that the ICJ would later give in *LaGrand* (Fed. Rep. Germany v. United States), 2001 ICJ 104, and in *Avena*. The Court observed that it was "unfortunate that this matter comes before us while proceedings are pending before the ICJ that might have been brought to that Court earlier." 523 U.S. at 378. That matter came to this Court only a few days before Breard's scheduled execution date;[3] the treaty issues had not been briefed on the merits at either the ICJ or this Court; and the ICJ order in question was a provisional measures order whose effect was disputed,[4] rather than a final judgment whose binding force is clearly established by the U.N. Charter and the ICJ Statute (*see* Section III.B below).

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[3] The *LaGrand* matter, filed the year after *Breard*, was presented to this Court only two hours before petitioner's scheduled execution. *See* 526 U.S. 111.

[4] The ICJ later held that provisional measures orders are binding. *LaGrand*, 2001 ICJ 104.

By contrast, the present matter has had the benefit of full briefing at the ICJ with full U.S. participation, and the final judgment constitutes an authoritative and legally binding interpretation and application of the treaty. This Court should thus reconsider those aspects of *Breard* that may have been based on what has subsequently been determined to be an incorrect interpretation of the treaty, and should settle important questions of treaty compliance that were either not resolved or were addressed insufficiently by *Breard*.

A. Petitioner's Treaty Right to Procedural Protections as Ordered by the ICJ Cannot Be Precluded by a Failure to Follow State Procedural Rules.

The per curiam ruling in *Breard* summarily concluded that a habeas petitioner alleging a Vienna Convention violation has no remedy on a procedurally defaulted claim. The subsequent ICJ rulings in *LaGrand* and *Avena* have undercut this element of *Breard*. Nor did this Court consider in *Breard*, as it normally does in cases of arguable conflict between international law and otherwise applicable domestic law, whether a harmonizing construction could be found that would enable the United States to comply with its international obligations. By contrast, just last Term this Court reaffirmed the presumption of *Murray v. Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804) that "an Act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *Cf. F. Hoffman-LaRoche Ltd. v. Empagran, S.A.*, 124 S. Ct. 2359, 2366 (2004) (rule of statutory construction applied in *Empagran* reflects principles of international law - "law that (we must assume) Congress ordinarily seeks to follow");[5]

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[5] Indeed, there is no indication whatsoever that Congress expected to impede U.S. compliance with the Vienna Convention or that it was even made aware of the possibility of conflict with international obligations at the time of any enactment subsequent to the Vienna Convention. *Cf. United States v. Palestine Liberation Org.*, 695 F. Supp. 1456 (S.D.N.Y. 1988) (Palmieri, J.) (court construed antiterrorism statute to avoid placing U.S. in violation of international law, upon finding that Congress did not know that the statute would be incompatible with U.S. obligations). As explained below (p. 22), in approving the Vienna Convention, the Senate understood from the federal Executive that the treaty would prevail over any conflicting federal or state law.

Hartford Fire Ins. Co. v. California, 509 U.S. 764, 815 (1993) (Scalia, J., dissenting). Summary denial of the *Breard* petition therefore cut off exploration of alternative constructions or mechanisms that might have enabled fulfillment of U.S. treaty obligations.

The foreshortened time frame for addressing the *Breard* petition left unaddressed the important questions of federal law that would arise if responsibility for redressing violations of an international treaty were left exclusively in state hands, beyond federal judicial power to correct. The per curiam order in *Breard* intimated that the state governor could be the organ of treaty compliance of last resort[6] – a result clearly at odds with the proper understanding of allocation of federal-state competence in treaty cases, and with the Supremacy Clause of Article VI of the Constitution. It is important, *Amici* submit, that any inference that might be drawn from this Court's decision in *Breard* not be extended beyond that case to cases such as the present one, involving a treaty right confirmed by a final and binding judgment of the ICJ. The court below surely adopted a questionable interpretation of *Breard* in concluding that *state* procedural default rules could cut off the exercise of a federal treaty right,[7] when the authoritative international interpreter of the treaty has determined that such applications of procedural default rules are themselves treaty violations. Federal courts do not lack jurisdictional power to correct such state violations.

Further, it is important, in the view of *Amici*, to keep in mind the purpose of Article 36 of the Vienna Convention, which (like the *Miranda* rule in the United States) is not addressed to guilt or innocence or to the appropriateness of a sentence. Rather, Article 36 is addressed to procedural safeguards to inform a defendant of his rights, so that the determination of guilt and of punishment in the event of conviction are carried out under procedures enabling the defendant to have the benefit of all the rights to which he is entitled – including his treaty rights. It cannot be the law that a treaty-based opportunity to secure a treaty-based right, whose very purpose is to protect a foreign defendant, can be snuffed out by failure to assert the right under a state procedural rule when that failure itself arises from a state violation of the treaty.

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[6] 523 U.S. at 378.

[7] As this Court stated in *Baker v. Carr*, 369 U.S. 186, 212 (1962), "Though a court will not undertake to construe a treaty in a manner inconsistent with a subsequent federal statute, no similar hesitancy obtains if the asserted clash is with state law."

B. Recent Decisions of This Court Support Respect for the ICJ Judgment.

Since *Breard*, this Court has addressed the considerations that properly inform the allocation of authorities between state and national levels in respect of foreign relations, as well as those affecting federal jurisdictional power in foreign relations cases. These post-*Breard* rulings bear upon the duty of state and federal courts to give effect to the ICJ judgment in *Avena*.

In *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 383 (2000), this Court noted, in invalidating a state law, that European states and Japan had lodged complaints at the World Trade Organization against the state measure, which had embroiled the national government for some time in an international dispute settlement procedure.[8] *A fortiori*, in the face of a final and binding judgment from a treaty-based dispute settlement procedure, a state rule must not impede treaty compliance and a federal judicial remedy must be available.

In *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2763, 2767 (2004), this Court distinguished between rights under a treaty that the political branches have declared to be non-self-executing, and those under a self-executing treaty. Federal judicial enforcement of self-executing treaties is to be expected, and the same should follow for implementation of authoritative and binding international interpretations of self-executing treaties. Since the political branches have consistently treated the Vienna Convention as self-executing (Section III.C below), the logic of *Sosa* favors federal judicial enforcement of the treaty.[9]

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[8] There was no final international judgment in *Crosby*, as there is here, since the WTO proceedings had been suspended by consent. *See also American Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003) (invalidating state law because of conflict with federal policy in executive agreement on Holocaust claims). The judgment of an international tribunal authoritatively interpreting a treaty stands on a stronger footing than the executive policy that was held to preempt state law in *Garamendi*.

The construction of the federal habeas statute in *Rasul v. Bush*, 124 S. Ct. 2686 (2004), suggests that this Court should not leave petitioner without a judicial remedy. In *Rasul*, even the strenuous opposition of the Executive to the availability of habeas relief did not persuade this Court that the federal courthouse door should be closed to foreign petitioners claiming rights under federal law. As in *Rasul*, where international commitments and the reputation of the United States as a law-abiding nation are at stake, this Court should act to preserve and effectuate the availability of a judicial remedy for denial of federally protected rights, including the federal habeas remedy for a petitioner invoking a right guaranteed by an international treaty, as confirmed and mandated by the ICJ.

III. THE ICJ JUDGMENT RESULTED FROM A TREATY-BASED JUDICIAL PROCESS TO WHICH THE UNITED STATES AGREED, IN WHICH THE UNITED STATES PARTICIPATED FULLY, AND WHICH BINDS THE UNITED STATES AS A WHOLE.

Amici respectfully draw the attention of this Court to the fully consensual nature of the obligations undertaken when the United States agreed by treaty to the rules of consular law in the Vienna Convention and to the Optional Protocol's system for binding settlement of disputes thereunder. The United States is free not to enter into treaties, and is free not to accept optional dispute settlement clauses in treaties; but once having given consent to a treaty and to a treaty-based dispute settlement provision, the United States is bound to comply with the obligations to which it has agreed.

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[9] *Sosa* did not decide whether availability of international tribunals might affect enforceability of an international law claim in U.S. courts, but this Court said it "would certainly consider" the potential relevance of international remedies "in an appropriate case." 124 S.Ct. 2766 n. 21.

A. The Vienna Convention Protects U.S. Nationals Abroad and Foreign Nationals in the United States.

The Vienna Convention codifies and transforms into multilateral treaty law a body of rules that evolved over centuries. Until the 1960s, consular practice was governed by customary law and bilateral treaties. While the core customary law of consular relations was generally well-understood, uncertainties persisted and disputes frequently arose. Disagreements over the treatment of U.S. nationals in Mexico and Mexican nationals in the United States – including instances of denial of consular access – led to diplomatic protests and international arbitration. *See* 4 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 830-837 (1942) [Hackworth]; M. WHITEMAN, DIGEST OF INTERNATIONAL LAW, vol. 7 at 626-658; vol. 8 at 807-837 (1970) [Whiteman].

In the 1920s, a U.S.-Mexican Claims Commission (established by treaty to resolve disputes involving treatment of nationals) considered claims of several U.S. nationals for having been arrested in Mexico and detained without access to a U.S. consular office. Regarding the opportunity to communicate with the consulate, the Commission held that "a foreigner, not familiar with the laws of the country where he temporarily resides, should be given this opportunity." *Walter H. Faulkner* (U.S. v. Mex.), Opinions of the Commissioners Under the Convention Concluded September 8, 1923 (1927) at 86, 90; *see also* 4 Hackworth 830. Conversely, in an incident where Mexico complained that California officials had not given the Mexican consulate access to a Mexican citizen detained in a California jail, the Department of State stressed the importance of California's compliance with the standards maintained by the United States in its dealings with other countries:

> Even in the absence of applicable treaty provisions this Government has always insisted that its consuls be permitted to visit American citizens imprisoned throughout the world and it is believed that if [the] attitude [of the] District Attorney is maintained in [the] instant case there

> will be repercussions in Mexico and perhaps other countries unfavorable to American citizens.

4 Hackworth 836.

By the middle of the 20th century, the desirability of a multilateral treaty to codify consular law and provide for settlement of consular disputes was clear. Treaty codifications of customary international law not only produce greater certainty in rules governing state behavior, but also enjoy a clearer status than uncodified custom in many legal systems. A multilateral mechanism for binding settlement of consular disputes would likewise strengthen compliance with consular law and avoid or mitigate the kinds of problems that the examples from U.S.-Mexican practice illustrate; it would also obviate the need for special arbitration agreements in consular disputes.

Codification of the rules of consular law was undertaken by the U.N. International Law Commission [ILC]. *See* 1961-II Y.B. Int'l L. Comm'n 88-128. A diplomatic conference on the ILC draft resulted in the Vienna Convention, which was opened for signature on April 24, 1963, and entered into force on March 19, 1967. *See* Report of the United States Delegation to the Vienna Conference on Consular Relations, reprinted in Sen. Exec. E, 91st Cong., 1st Sess., May 8, 1969, at 41, 59-61 [Report of U.S. Delegation]. The United States played a leading role in the Vienna conference and in the negotiations over the specific wording of Article 36 of the Vienna Convention and the Optional Protocol. *See* Report of U.S. Delegation at 41, 59-61. Indeed, the United States proposed the provision on dispute settlement that became the Optional Protocol. Not only did the United States initiate and actively advocate the proposal for binding dispute settlement, but it resisted others' efforts to eliminate or weaken the dispute settlement provisions. *See* Report of U.S. Delegation at 72-73. The formulation from the Vienna Conference, fully supported by the United States, was an Optional Protocol on compulsory dispute settlement that states would be free to accept or not; upon acceptance, a binding obligation would be created. *Ibid*. As discussed below, the United States voluntarily accepted the Optional Protocol when it ratified the Vienna Convention in 1969. As of 2005, the Vienna Convention has 166 parties, of which 46 have also become parties to the Optional Protocol. *See* Status of Multilateral Treaties Maintained by the U.N. Secretary-General, *available at* http://untreaty.un.org.

The Vienna Convention dispute settlement system promotes a uniform and high level of compliance among the treaty parties. *Avena*, para. 47. Of course, no state can unilaterally determine the meaning of an international treaty. *See Jesse Lewis (The David J. Adams) Claim* (U.S. v. Gr. Br., 1921), 6 U.N. Rep. Int'l Arb. Awards 85 (decision of British court could not be conclusive of meaning of U.S.-British treaty; arbitral tribunal had competence to interpret the treaty authoritatively). Thus, in a dispute over the interpretation and application of the Vienna Convention, the United States cannot impose its own view on its treaty partners,[10] or establish the measure of its own treaty compliance. For the same reason, disputes over the application of the Vienna Convention to particular facts, or over the remedy for breach of the Convention, cannot be determined by the United States as one party to the dispute. For authoritative resolution of such disputes, the Optional Protocol confers jurisdiction on the ICJ.

Refusal to grant review and reconsideration of Medellin's conviction and sentence as required by the ICJ would compound the treaty violation that occurred when the Texas authorities failed to inform Medellin of his right to communicate with the Mexican consulate. Such a refusal to accord this treaty-based remedy for a treaty violation would undermine the U.S. ability to insist on compliance by other states with their obligations under the Vienna Convention toward the millions of U.S. nationals who visit or work in Mexico and in the other 164 parties to the Convention. In view of the immense number of nationals of the United States who travel or work abroad, the United States has a special stake in the worldwide, faithful performance of the Convention.

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[10] For this reason, U.S. courts ought to give careful consideration to reasoned positions adopted by other courts – foreign or international – on points of treaty interpretation. *Cf. Olympic Airways v. Husain*, 540 U.S. 644, 660 (Scalia, J., dissenting). Where a tribunal has been accepted by the U.S. political branches as the forum for binding settlement of treaty disputes, deference to its judgment is not just advisable but required.

B. The United States Fully Consented to ICJ Jurisdiction to Decide Disputes Under the Vienna Convention, Within the Framework of the U.N. Charter and ICJ Statute, and Is Therefore Bound to Comply.

Amici respectfully emphasize that the United States freely agreed to the compulsory jurisdiction of the ICJ to resolve Vienna Convention disputes, and thus voluntarily accepted a binding obligation to carry out the resulting judgment. The basis for the compulsory jurisdiction of the ICJ over this dispute is Article I of the Optional Protocol.[11] The United States has consented through the proper processes under domestic and international law both to submit Vienna Convention disputes to ICJ jurisdiction, and to comply with the ICJ's judgment in a matter interpreting a treaty with an agreed dispute settlement protocol.

Under Article 94(1) of the Charter of the United Nations, 59 Stat. 1031, T.S. 993 (1945) [U.N. Charter], "[e]ach Member of the United Nations undertakes to comply with the decision of the [ICJ] in any case to which it is a party." Under Article 59 of the Statute of the ICJ, 59 Stat. 1055, T.S. 993 (1945) [ICJ Statute], which is annexed to the U.N. Charter and is an integral part thereof,[12] decisions of the Court have "no binding force *except between the parties and in respect of that particular case*" (emphasis added); thus, as between the United States and Mexico in respect of *Avena* (which includes the Medellin matter), the decision of the ICJ is indeed binding. By ratifying the U.N. Charter and the annexed ICJ Statute as a treaty with the advice and consent of the U.S. Senate under Article II of the Constitution in 1945, the United States accepted the duty to comply with ICJ judgments in any cases that would come within the ICJ's consensual jurisdiction in the future. The undertakings to comply with ICJ decisions and to treat them as binding remain in force as treaty obligations of the United States.

The jurisdiction of the ICJ in the *Avena* case was founded on consent and reciprocity under Article 36(1) of the ICJ Statute, which establishes jurisdiction over "all matters specially provided for ... in treaties and conventions in force." The Optional Protocol is a treaty in force under Article 36(1) of the ICJ Statute. Proceedings under Article 36(1) produce binding judgments under Article 59 of the Statute.[13]

It is critical for the United States to uphold the obligatory character of compulsory jurisdiction under the Optional Protocol and the binding nature of ICJ judgments thereunder, not only in order to uphold the integrity of commitments of international law but also because this treaty and treaty-based jurisdictional mechanism protect important U.S. interests. The United States was the first state to invoke the Optional Protocol, when it brought an application against Iran concerning U.S. diplomatic and consular personnel who were held hostage in Tehran in 1979. *See United States Diplomatic and Consular Staff in Tehran* (United States v. Iran), 1979 ICJ 7, 1980 ICJ 3, 5, 24-26. The U.S. pleadings in that matter analyze the obligation of parties to the Optional Protocol to submit to compulsory jurisdiction when disputes arise and to abide by ICJ decisions. *See* 1979 ICJ Pleadings, *United States Diplomatic and Consular Staff in Tehran,* at 141-152. The availability of the Optional Protocol to the United States in that case marked a major advance over the situation prior to the Vienna Convention, when the United States was unable because of the lack of preexisting jurisdictional consent to bring disputes

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[11] Article I states: "Disputes arising out of the interpretation or application of the [Vienna] Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by a written application made by any party to the dispute being a Party to the present Protocol."

[12] According to Article 93 of the U.N. Charter, all U.N. Members are *ipso facto* parties to the ICJ Statute.

[13] The treaty-based compulsory jurisdiction between states under Article 36(1) of the ICJ Statute is entirely separate from the procedure under Articles 65-68 of the ICJ Statute according to which the ICJ may render advisory opinions to international organizations in certain matters. The *Avena* ruling in respect of Medellin is not an advisory opinion but rather a binding judgment under Article 59 of the ICJ Statute and Article I of the Optional Protocol.

about denial of consular access to the ICJ.[14] When the ICJ indicated provisional measures against Iran in 1979 and entered a final judgment in favor of the United States in 1980, the United States insisted on Iranian compliance and invoked the ICJ's decisions in U.S. and foreign tribunals.

Approximately 70 other U.S. treaties now in force contain obligations comparable to those in the Optional Protocol for submission of treaty-based disputes to the ICJ.[15] These include bilateral and multilateral treaties involving substantial economic, political, and other interests. The United States is a frequent litigant at the ICJ, both as applicant and as respondent. Indeed, the United States has been involved in more ICJ cases than any other state:[16] in total, the United States has been party

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[14] In 1954 the United States filed an ICJ case against Hungary claiming denial of consular access in respect of four U.S. airmen who were tried in Hungary after their plane was brought down. 1954 ICJ Pleadings, *Treatment in Hungary of Aircraft and Crew of the United States of America* (U.S. v. Hung.), at 19-20, 31, 35-36. The case was dismissed because Hungary had not consented to ICJ jurisdiction. 1954 ICJ 99. Hungary is now party to the Optional Protocol.

[15] *See* Fred L. Morrison, *Treaties as a Source of Jurisdiction, Especially in U.S. Practice, in* The International Court of Justice at a Crossroads 58-81 (Lori F. Damrosch ed., 1987) [Crossroads]. To the best of *Amici*'s knowledge, all such treaties remain in force for the United States as of 2005, as specified for each such treaty in the Department of State publication, Treaties in Force. Two treaties with ICJ compromissory clauses came into force for the United States after the completion of the Morrison study: the Convention on the Physical Protection of Nuclear Material, T.I.A.S. No. 11080 (in force as of Feb. 8, 1987), and the International Convention against the Taking of Hostages, T.I.A.S. No. 11081 (in force as of Jan. 6, 1985).

In 1985 the United States gave notice of termination of its acceptance of compulsory jurisdiction under the general compulsory jurisdiction clause of Article 36(2) of the ICJ Statute and of its treaty of friendship, commerce and navigation with Nicaragua, the two bases of jurisdiction on which the ICJ had relied in the *Nicaragua* case, note 20 below. No other bases of jurisdiction have been terminated since that time. Indeed, it is striking that even in the aftermath of Paraguay's suit on behalf of Breard and Germany's suit on behalf of the LaGrand brothers at the ICJ, the United States has taken no steps to terminate acceptance of the Vienna Convention's Optional Protocol.

[16] For a listing of all ICJ cases from 1946 to the present grouped by state, *see* the ICJ website at www.icj-cij.org [ICJ Website].

to 21 cases at the ICJ,[17] of which 10 have been brought by the United States as applicant or by special agreement and 11 have been brought against the United States.[18] Since each of the 70 treaties with an ICJ dispute settlement clause entails binding obligations under those treaties and under the U.N. Charter (art. 94) and ICJ Statute (arts. 36(1), 59), failure to carry out *Avena* could prejudice the ability of the United States to hold other states to their dispute settlement obligations and to sustain U.S. credibility before the ICJ in future proceedings. While not all of these treaties are self-executing or confer individual rights subject to judicial protection, the Vienna Convention is indeed a treaty contemplating domestic judicial implementation in favor of individuals, and it is therefore the responsibility of the judiciary in this case to ensure compliance.

The United States has a crucial stake in maintaining a record of compliance with ICJ judgments, since we continue to be an active litigant in that forum. Compliance with ICJ final judgments has generally been quite high, including in the cases in which the United States has been a party: recent articles find overall compliance with approximately two-thirds of the ICJ's substantive judgments and as high as 80% compliance with final judgments over a substantial period.[19]

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[17] The United States has also taken part in almost all of the two dozen proceedings involving requests for advisory opinions under Article 65 of the ICJ Statute. *See* Goler Teal Butcher, *The Consonance of U.S. Positions with the International Court's Advisory Opinions, in* Crossroads at 423; for a current listing, *see* ICJ Website.

[18] The cases initiated by the United States include seven involving Soviet-bloc aerial incidents. More recently, the United States invoked the ICJ in the *Tehran Hostages* case against Iran (1979-81), the *Gulf of Maine Boundary* (Canada 1981-84), and *Elettronica Sicula S.p.A. (ELSI)* (Italy 1987-89). *See* pp. 18-19 below.

[19] *See* Colter Paulson, *Compliance With Final Judgments of the International Court of Justice Since 1987*, 98 Am. J. Int'l L. 434, 456-460 (2004) (finding compliance rate of 60% with final judgments issued over last 15 years, with likelihood that rate would go up to 80% rate for previous periods in light of states' efforts to achieve compliance over time); Tom Ginsburg & Richard H. McAdams, *Adjudicating in Anarchy: An Expressive Theory of International Dispute Resolution*, 45 Wm. & Mary L. Rev. 1229, 1308-1311 (2004)

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States have exceptionally disregarded the ICJ's rulings when they considered that the Court lacked a proper consensual foundation to decide the case, notably where respondents insisted that the Court had been granted no competence to decide a matter involving a state's vital national security interests.[20] In the present case, of course, jurisdiction was by consent and no U.S. security interest would be prejudiced by compliance.

Implementation of ICJ judgments has proceeded smoothly in almost all treaty-based cases and those involving the rights of aliens within a state's territory. In the first case leading to a final judgment involving the United States, both the United States and France promptly complied with the judgment in *Rights of Nationals of the United States of America in Morocco* (France v. United States), 1952 ICJ 176.[21] In *Delimitation of the*

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(finding an overall compliance rate of 68%, counting disregard of provisional measures orders as noncompliance); Jonathan I. Charney, *Disputes Implicating the Institutional Credibility of the Court, in* Crossroads at 288, 310-319 (finding only 5 cases of noncompliance with final judgments 1946-1986).

[20] *See* especially the U.S. position on *Military and Paramilitary Activities in and against Nicaragua* (Nicar. v. U.S.), 1986 ICJ 14, discussed further at note 28 below. For similar reasons, France denied the existence of proper ICJ jurisdiction in the *Nuclear Tests* cases (Austl. & N.Z. v. Fr.), 1974 ICJ 253, 457. The United States and France reacted to these cases by withdrawing their acceptances under the general compulsory jurisdiction clause of Article 36(2) of the ICJ Statute, while maintaining treaty-based acceptances under Article 36(1).

[21] The final judgment in *Morocco* had elements requiring implementation by each side. The United States dismissed all pending cases before U.S. consular courts in Morocco that were outside the limits of jurisdiction specified by the ICJ, and French courts relied on the judgment in local (Moroccan) and appellate rulings (by the *Cour de cassation*), which referred to the ICJ judgment as dispositive of legal issues. *See* Manley O. Hudson, *The Thirty-First Year of the World Court*, 47 Am. J. Int'l L. 1, 8, 14-15 (1953); Note, *Judicial Decisions: Morocco–Criminal Jurisdiction over U.S. Citizens– . . . –International Court of Justice*, 49 Am. J. Int'l L. 263, 267 (1955); Christoph C. Schreuer, Decisions of International Institutions Before Domestic Courts 33-34, 199 (1981) (noting that the French courts "do not seem to have regarded any domestic implementing measures for the application of the International Court's judgment as being necessary").

Maritime Boundary in the Gulf of Maine Area (Canada/United States), 1984 ICJ 246, the final judgment drew a boundary in the Gulf of Maine. Both sides accepted the judgment and promptly complied.[22] In *ELSI*, 1989 ICJ 15, the United States embraced the ICJ forum as part of its diplomacy and accepted the final judgment as dispositive of the claims it had raised with Italy on behalf of U.S. investors.[23] Thus, apart from *Nicaragua* (addressed in note 28 below) and such continuing compliance problems as may exist in the wake of *LaGrand* and *Avena*, the United States has complied with all final ICJ judgments addressed to it and has benefited from the compliance of all of its adversaries with final judgments addressed to them, except for Iran in the *Tehran Hostages* case.[24]

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[22] Compliance having been assumed and therefore not challenged, only a few cases in the two countries refer to the ICJ judgment. *See, e.g., Conde v. Starlight I Inc.*, 103 F.3d 210 (1st Cir. 1997) (Hague Line mentioned, with reference to vessel operator's apprehension of possibility of detection by Canadian patrol boat on Canadian side of the line); *Comeau's Sea Foods Ltd. v. Canada (Minister of Fisheries and Oceans)*, [1992] 3 F.C. 54, [1992] F.C.J. No. 410, *reversed*, [1995] 2 F.C. 467, 1995 F.C. LEXIS 146, *affirmed*, [1997] 1 S.C.R. 12, [1997] S.C.J. No. 5 (plaintiff sought lobster fishing license in area awarded to Canada by ICJ); *Mersey Seafoods Ltd. v. Minister of Nat'l Revenue*, [1985] 2 C.T.C. 2485, 1985 CarswellNat 439 (Tax Court of Canada 1985), paras. 142-147 (taxpayer claimed that offshore fish processing occurred "in Canada"; Tax Court noted that ICJ decision had become available after arguments had concluded).

[23] *See* Terry D. Gill, *International Court of Justice – Diplomatic Protection – U.S.-Italian Treaty of Friendship, Commerce and Navigation*, 84 Am. J. Int'l L. 249, 257 (1990).

[24] In addition to the cases discussed in the text, the disposition of the remainder of the cases to which the United States has been party follows:

Dismissal on Threshold Ground (No Jurisdiction or Claim Inadmissible): The seven Soviet-bloc *Aerial Incident* cases were dismissed for lack of jurisdiction. 1954 ICJ 99 (U.S. v. Hung.); 1954 ICJ 103 (U.S. v. USSR); 1956 ICJ 6 (U.S. v. Cz.); 1956 ICJ 9 (U.S. v. USSR); 1958 ICJ 158 (U.S. v. USSR); 1959 ICJ 276 (U.S. v. USSR); 1960 ICJ 146 (U.S. v. Bulg.). *Monetary Gold Removed from Rome in 1943* (Italy v. Fr., U.K., U.S.), 1954 ICJ 19, was dismissed because of the absence of an indispensable party.

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In view of the U.S. interest in maintaining this compliance record,[25] this Court should enter the appropriate orders to ensure that the courts below uphold the U.S. obligations of compliance in the present case.

This Court has long recognized that when the United States undertakes to participate in an international dispute settlement procedure, the good faith of the United States is implicated in carrying out the resulting award. *See, e.g., La Abra Silver Mining Co. v. United States,* 175 U.S. 423, 463 (1899). In *Dames & Moore v. Regan,* 453 U.S. 654, 679-680 (1981), this Court explained that claims by nationals of one country against another can be "sources of friction" in international relations and that international dispute settlement procedures embraced by the U.S. political branches are a traditional and proper method for resolving such grievances. This Court has likewise repeatedly referred to the ICJ as an authoritative tribunal for settling disputed points of international law.[26] Implementation of the *Avena* judgment here is thus consistent with this Court's established jurisprudence in respect of international dispute settlement.

C. The Vienna Convention, Optional Protocol, and *Avena* Bind the State and Federal Courts and May Be Implemented Through Federal Judicial Action.

The ICJ judgment in Medellin's case implements a treaty obligation of the United States which is the supreme law of the land (U.S. Const. art. VI). It thus is binding on all state and federal courts. Hence, on Medellin's federal habeas petition, *Avena* should be followed as the rule of decision.

The Senate approved the obligations of the Vienna Convention and ICJ compulsory jurisdiction over disputes under it when it gave unanimous advice and consent to ratification of the Vienna Convention and the Optional Protocol. *See* 115 Cong. Rec. 30997 (Oct. 22, 1969).[27] The

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Interhandel (Switz. v. U.S.), 1959 ICJ 16, was dismissed for failure to exhaust local remedies. *Legality of Use of Force* (Yugoslavia v. U.S.), 1999 ICJ 916, was dismissed for lack of jurisdiction.

Dismissal Upon Settlement: Aerial Incident of 3 July 1988 (Iran v. U.S.), 1996 ICJ 9, was discontinued after the United States agreed to make an *ex gratia* payment in settlement. *Lockerbie (Questions of Interpretation and Application of the 1971 Montreal Convention)* (Libya v. U.S.), 2003 ICJ 152, was discontinued in connection with an overall settlement. *Vienna Convention on Consular Relations* (Paraguay v. U.S.), 1998 ICJ 426, was discontinued after the entry of provisional measures and before proceedings on the merits.

Dismissal on Merits: Oil Platforms (Iran v. U.S.), 2003 ICJ 161, was dismissed on the merits of both Iran's claim and the U.S. counterclaim.

[25] On the rare occasions when the United States has failed to abide by consensually-assumed dispute settlement obligations, there is no doubt that U.S. interests have suffered as a result. Many authors have documented the detriments to U.S. economic, commercial, political and other interests in Mexico from the prolonged failure of the United States to comply with the arbitral award in Mexico's favor in the *Chamizal Tract* arbitration. *See, e.g.*, Sheldon B. Liss, A Century of Disagreement: The Chamizal Conflict, 1864-1964 68-69, 75-77, 86-88, 100-101 (1965); Antonio Gómez Robledo, México y el Arbitraje Internacional 161 (1965); Percy Don Williams, Jr., *Fifty Years of the Chamizal Controversy – A Note on International Arbitral Appeals*, 25 Tex. L. Rev. 455, 461-462 (1947) (on U.S. difficulties in negotiating with Mexico over expropriation of American-owned agrarian and petroleum properties, in view of U.S. noncompliance with *Chamizal* award); *see also* Francis J. Weber, The United States Versus Mexico: The Final Settlement of the Pious Fund 42-50 (1969) (on linkage between U.S. rejection of *Chamizal* and Mexico's suspension of payments under *Pious Fund* award). President John F. Kennedy said in a news conference in 1962 that because the United States had not carried out the award, "Mexico has been unwilling to take any other matter to arbitration, which has, of course, therefore lessened the harmony between the two countries." *See Kennedy Says U.S. Was Wrong in Mexico Border Disagreement*, N.Y. Times, Jul. 6, 1962, at 4, 8.

At the time of the eventual Chamizal settlement in 1963, the office of the Texas Attorney General concurred with the opinion of the Legal Adviser of the U.S. Department of State that the matter could be resolved with Mexico by treaty without Texas's consent, because of its international implications. *See* Liss at 95-97; 3 Whiteman at 680, 696-699.

[26] *See, e.g., United States v. Maine,* 475 U.S. 89, 99 (1986); *United States v. Louisiana,* 470 U.S. 93, 107 (1985); *United States v. Louisiana,* 394 U.S. 11, 69-71 (1969) (all referring to the *Fisheries* case (U.K. v. Norway), 1951 I.C.J. 116, as legal authority in a maritime boundary dispute).

[27] The Vienna Convention and Optional Protocol entered into force for the United States on December 24, 1969. *See* Restatement (Third)

(Cont'd)

Vienna Convention has been understood at all times to be a self-executing treaty. As the Department of State witness informed the Senate in the hearings on the Vienna Convention, "The Convention is considered entirely self-executive and does not require any implementing or complementing legislation." Statement of J. Edward Lyerly, Deputy Legal Adviser for Administration, U.S. Department of State, Before the Senate Committee on Foreign Relations, reprinted in Sen. Exec. Rep. No. 91-9, 91st Cong., 1st Sess. (1969), at 5. Likewise, there has never been the slightest doubt that the Vienna Convention would prevail over any inconsistent state law. The priority of treaty law over state law not only is required by the Supremacy Clause but was spelled out explicitly in the State Department's responses to the Senate's questions, as follows:

> *Question. What is the effect of the convention on (a) Federal legislation; and (b) State laws?*
>
> Answer [after explaining a possible area of conflict not relevant here].
>
> To the extent that there are conflicts with Federal legislation or State laws the Vienna Convention, after ratification, would govern as in the case of bilateral consular conventions.

Sen. Exec. Rep. No. 91-9, at 18. This official response about the controlling effect of the Vienna Convention raised no concerns in the Senate, which gave unanimous advice and consent.

Because *Avena* specifies what is required by the Vienna Convention itself as a remedy for breaches, all aspects of the present petition are properly understood as implementation of self-executing treaty obligations.[28]

(Cont'd)

of the Foreign Relations Law of the United States (1987) [Restatement], Intro. Note to Part III and §§ 301-312, 321; Intro. Note to Part IV, ch. 6 (preceding § 464) and § 465. The Restatement also confirms that the Vienna Convention is self-executing. Intro. note before § 464.

[28] The decision in *Committee of United States Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 937-938 (D.C. Cir. 1988), which includes

(Cont'd)

Just as no legislation was required to implement the treaty obligation to inform Mexican nationals of their consular rights, no legislative action is needed to afford Medellin the treaty-based remedy that the ICJ has concluded is necessary to redress the failure to inform Medellin of this right. *Avena* declares the obligations that existed when Medellin was arrested (the obligation to inform him of his treaty rights) and subsequently when he was tried, convicted, and sentenced in ignorance of his treaty rights (the treaty-based obligation to remedy the violation from failure to inform); makes findings of breach; and determines a remedy. The remedy prescribed is well within the competence of state and federal courts to review and correct illegal acts in connection with judicial proceedings.

In failing to give to petitioner the consular notification and opportunity of consular assistance required by the Vienna Convention, the United States violated its obligation to Mexico, as the ICJ has held. The ICJ did not order the United States to pay monetary compensation (which Mexico did not request), but it held that an apology was not enough. The reparation ordered by the Court was for the United States to grant review and reconsideration of the conviction and sentence of petitioner and the other similarly situated Mexican nationals. The Fifth Circuit mistakenly held that an individual in petitioner's position had no private right that a federal court could enforce. That court misunderstood the nature of the remedy requested here: what petitioner seeks is vindication

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(Cont'd)

dicta suggesting that an ICJ judgment might not be self-executing, is distinguishable. In *Nicaragua*, the ICJ judgment did not involve a self-executing treaty, but rather entailed aspects of international law (the use of military force) that would be considered non-self-executing in U.S. law. The plaintiffs who sought to enforce the ICJ's *Nicaragua* judgment lacked any relationship to the ICJ case, *see* 859 F.2d 938, while *Avena* explicitly deals with Medellin and specifies the remedial dimension of his claim under a self-executing treaty. Finally, Congress and the President had repudiated the ICJ judgment in *Nicaragua* by enacting a subsequent statute in conflict with it, which the court of appeals found determinative, *see* 859 F.2d 936-937. Here, there is no statute rejecting *Avena*, nor any hint that the Executive rejects compliance.

in concrete terms of a treaty-based right that the ICJ has awarded to the state of petitioner's nationality that exercised the right of diplomatic protection on his behalf and for his benefit. In failing to accord this treaty-based remedy, the court below closed its eyes to the obligation of the United States to ensure compliance with the Vienna Convention.

There can be no objection that *Avena* calls upon the United States to alter the manner in which state criminal jurisdiction would ordinarily be exercised.[29] Treaties may and often do require states to modify the exercise of their judicial jurisdiction, and even to refrain from exercising criminal jurisdiction. For example, the Vienna Convention codifies rules of international law granting immunities from judicial jurisdiction to consular officers, including in criminal matters. *See* Vienna Convention, arts. 41-45. Where a treaty provides for the immunity of a foreign official from judicial jurisdiction, state and federal courts alike are required to recognize the immunity accorded by international law, notwithstanding any impact on state law enforcement interests. *See Commonwealth*

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[29] Since both Mexico and the United States are federal states, there is a strong national interest in ensuring compliance with international obligations at both state and federal levels, in both the United States and Mexico. If U.S. states were free to violate and then fail to remedy treaty violations, with no federal judicial remedy available, the consequences in U.S.-Mexican relations would be severe. The United States as a whole is responsible for state violations of international law. Where U.S. courts can avoid such violations by carrying out the judgment of an authoritative international tribunal, they are required to do so.

In the early 20th century, in preparation for an arbitration with Mexico involving protection of nationals of one country in the territory of the other, State Department lawyers sought instructions on how to deal with legal issues concerning actions of states of the Mexican federation, in light of considerations of U.S. federalism that would apply on a mirror-image basis. The Department of State replied that "in our dealings with foreign Governments having a federal system similar to our own, we have invariably insisted on the liability of the Federal Government." 5 Hackworth at 593, 597.

Indeed, the United States has even accepted an obligation to make monetary reparations in respect of failure of state or local authorities to protect foreign nationals in accordance with international standards. *See* RESTATEMENT § 207, Reporters' Note 3.

v. Jerez, 390 Mass. 456, 457 N.E.2d 1105 (1983) (criminal complaint against consul had to be dismissed because of immunity under Vienna Convention). *Cf. In re Dillon*, 7 Fed. Cas. 710 (No. 3914) (N.D. Cal. 1854) (recognizing treaty immunity of consul from defendant's subpoena in a criminal case, notwithstanding constitutional guarantee of compulsory process to obtain witnesses).

The *Arrest Warrant* case illustrates compliance by domestic judicial authorities with a final ICJ judgment affecting the implementation of domestic criminal law. The ICJ judgment in that case required Belgium to cancel an arrest warrant issued by a Belgian court against Congo's foreign minister, because of the immunities accorded to a sitting foreign minister under international law. *See Arrest Warrant of 11 April 2000* (Dem. Rep. Congo v. Belgium), 2002 ICJ 3. Belgian judges promptly complied with the ICJ judgment. *See War Crimes Case Against Former Foreign Minister "Inadmissible,"* AFRICA NEWS, Apr. 17, 2002, *available in* LEXIS, News Library, Allnws File.

The obligation of all U.S. judges, state or federal, to give effect to treaty-based rights of foreigners is beyond doubt. In *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 236-237 (1796), this Court established that a treaty with Britain would prevail over state laws confiscating the property of British subjects:[30]

> A treaty cannot be the supreme law of the land, that is of all the United States, if any act of a State Legislature can stand in its way . . . It is the declared will of the people of the United States that every treaty made, by the authority of the United States,

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[30] *See also Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. (7 Cranch) 603 (1813) (treaty protected British property owners against forfeiture under state law).

Treaties providing inheritance rights for aliens have been held to prevail over state laws disqualifying aliens from inheriting. *See Hauenstein v. Lynham*, 100 U.S. 483 (1880); *Nielsen v. Johnson*, 279 U.S. 47 (1929); *Clark v. Allen*, 331 U.S. 503 (1947); *Kolovrat v. Oregon*, 366 U.S. 187 (1961). State prohibitions on land ownership have likewise had to yield to treaties giving aliens such rights. *Chirac v. Chirac*, 15 U.S. (2 Wheat.) 259 (1817).

> shall be superior to the Constitution and laws of any individual State; and their will alone is to decide. — If a law of a State, contrary to a treaty, is not void, but voidable only by a repeal, or nullification by a State Legislature, this certain consequence follows, that the will of a small part of the United States may controul or defeat the will of the whole. . . .
>
> Four things are apparent on a view of this 6th article of the National Constitution. . . . 4thly. That it is the declared duty of the State Judges to determine any Constitution, or laws of any State, contrary to the treaty (or any other) made under the authority of the United States, null and void. National or Federal Judges are bound by duty and oath to the same conduct.

In *Asakura v. Seattle,* 265 U.S. 332 (1924), a treaty providing for rights of Japanese nationals to carry on trade on a nondiscriminatory basis was invoked to invalidate a city ordinance excluding foreigners from certain occupations. This Court said:

> The treaty is binding within the State of Washington. . . . It stands on the same footing of supremacy as do the provisions of the Constitution and laws of the United States. It operates of itself without the aid of any legislation, state or national; and it will be applied and given authoritative effect by the courts.

265 U.S. at 341.

State and federal courts have frequently upheld treaty rights in cases coming within their jurisdiction, without awaiting any instruction from the federal Executive or the legislature. The Court of Appeals of Kentucky, in an opinion that the Supreme Court later called "very able" (*United States v. Rauscher,* 119 U.S. 407, 427-28 (1886)), wrote in a treaty case:

> When it is provided by treaty that certain acts shall not be done, or that certain limitations or restrictions shall not be disregarded or exceeded by the contracting parties, the compact does not need to be supplemented by legislative or executive action, to authorize the courts of justice to decline to override those limitations or to exceed the prescribed restrictions, for the palpable and all-sufficient reason, that to do so would be not only to violate the public faith, but to transgress the "supreme law of the land."

Commonwealth v. Hawes, 76 Ky. (13 Bush) 697, 702-03 (1878). Indeed, courts have regularly applied consular treaties as the supreme law of the land on a self-executing basis. *See, e.g., In re Zalewski,* 292 N.Y. 322 (1944) (holding a U.S.-Polish consular treaty to be the supreme law of the land and giving it a liberal construction to allow the Polish Consul-General to act as the personal agent for a Polish national and to exercise her right of election under a will).

This Court has repeatedly affirmed the need to undertake a "searching scrutiny" of state or local actions affecting U.S. foreign relations that may provoke consequences for the nation as a whole. *See, e.g., Japan Line, Ltd. v. County of Los Angeles,* 441 U.S. 434, 451 (1979). Where, as here, the Senate unanimously approved a treaty designed to secure the rights of Americans around the world and the ICJ has entered a judgment requiring review and reconsideration of a state conviction and sentence as the remedy for U.S. violation of that same treaty, no court in the United States is free to ignore the treaty-based judgment in favor of the foreigner. To allow the state of Texas to defeat the national interest in treaty compliance here would deny to the United States as a whole the benefits of the constitutional design, which makes treaty obligations supreme and gives federal courts judicial power to enforce them.

In *Hines v. Davidowitz,* 312 U.S. 52 (1941), which invalidated a Pennsylvania alien registration law as incompatible with the federal scheme for regulation of the treatment of aliens, this Court emphasized:

> One of the most important and delicate of all international relationships, recognized

> immemorially as a responsibility of government, has to do with the protection of the just rights of a country's own nationals when those nationals are in another country. Experience has shown that international controversies of the gravest moment, sometimes even leading to war, may arise from real or imagined wrongs to another's subjects inflicted, or permitted, by a government. . . . [A]part from treaty obligations, there has grown up in the field of international relations a body of customs defining with more or less certainty the duties owing by all nations to alien residents – duties which our State Department has often successfully insisted foreign nations must recognize as to our nationals abroad.

312 U.S. at 64-65. This Court found it of importance that the state measure "is in a field which affects international relations, the one aspect of our government that from the first has been most generally conceded imperatively to demand broad national authority. Any concurrent state power that may exist is restricted to the narrowest of limits . . . ." *Ibid*.

IV. THIS COURT SHOULD INSTRUCT THE COURTS BELOW TO GIVE EFFECT TO *AVENA* AS THE RULE OF DECISION.

The Executive Branch took no position in this case at the petition stage, and *Amici* are not aware of what position, if any, it will take at the merits phase.[31] In any event, *Amici* submit that this case calls for a national solution to be settled by this Court as a matter of law, both because the obligation in question is a national treaty obligation for judicial implementation, and because it would be unacceptable for treaties to be interpreted differently in different states of the

United States or between the United States and its treaty partners. Under this Court's jurisprudence, Executive views on treaty interpretation are entitled to much weight but are "not conclusive upon a court called upon to construe such a treaty in a manner involving personal rights." *See, e.g., Charlton v. Kelly*, 229 U.S. 447, 468 (1913); *Perkins v. Elg*, 307 U.S. 325 (1939). Accordingly, this Court has not only the authority but the responsibility to conclude that the correct interpretation of an international treaty is the one settled through an authoritative and binding process of dispute settlement, even if the Executive Branch previously advanced a different position unsuccessfully in the international litigation.

This Court should ensure that the Texas authorities comply with the *Avena* Judgment, whether or not there is an indication from the federal Executive Branch as to its position on the pending matter. The Executive Branch does not always take a position on particular foreign relations cases; even so, this Court has instructed the lower courts, including state courts, to follow federal rules with constitutional underpinnings in the field of foreign relations. In *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 420, 436 (1964), the Executive Branch, through the Department of State, had made a communication which the Supreme Court understood as "intended to reflect no more than the Department's then wish not to make any statement bearing on this litigation." As the Court explained,

> Often the State Department will wish to refrain from taking an official position, particularly at a moment that would be dictated by the development of private litigation but might be inopportune diplomatically. Adverse domestic consequences might flow from an official stand which could be assuaged, if at all, only by revealing matters best kept secret.

Rather than follow an approach under which the outcome of domestic litigation would turn on articulation of the State Department's position, the Court decided upon a federal rule of judicial decision, binding on federal and state courts alike.

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[31] In the *Torres* matter in Oklahoma (p. 5 above), the Department of State urged "careful consideration" to the ICJ ruling, which Oklahoma authorities correctly treated as binding. *See* Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law: Implementation of* Avena *Decision by Oklahoma Court*, 98 AM. J. INT'L L. 579, 581-84 (2004).

376 U.S. at 437. In *Zschernig v. Miller*, 389 U.S. 429, 434 (1968), this Court struck down an Oregon law affecting inheritance of an East German national, even though the Executive Branch brief *amicus curiae* before the Court "[did] not . . . contend that the application of the Oregon escheat statute in the circumstances of this case unduly interferes with the United States' conduct of foreign relations." The import of these cases is that the Executive need not make a specific statement as a predicate for judicial action to avoid injury on the international plane. In the present matter, it is for this Court, as the ultimate authority on domestic implementation of our international obligations, to instruct the lower courts to give effect to *Avena* as the rule of decision.

CONCLUSION

Amici urge this Court to ensure that actions of the authorities in Texas do not cause irreparable damage on the international plane. Review and reconsideration of Medellin's conviction and sentence is necessary to avoid the adverse consequences that would result from failure to comply with this treaty obligation. Such consequences could include refusal of other parties to the Vienna Convention to ensure the treaty-based rights of U.S. nationals abroad, as well as prejudice in connection with dispute settlement under this and other treaties.

This Court should reconsider its per curiam ruling in *Breard* in order to ensure compliance with the treaty obligations of the United States. At the end of the day, this Court's decision will make it possible to know with certainty where the responsibility for treaty compliance lies. By instructing the courts below to afford the remedy of review and reconsideration required to redress the treaty violation, this Court will fulfill its responsibility within our constitutional system and will maintain the standard for compliance with international obligations that is critical to protect U.S. interests abroad.

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No. 04-5928

IN THE

Supreme Court of the United States

JOSÉ ERNESTO MEDELLÍN,

Petitioner,

v.

DOUG DRETKE, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF *AMICUS CURIAE* OF AMBASSADOR L. BRUCE LAINGEN AND LIEUTENANT COLONEL JOHN J. SWIFT, *ET AL.*, IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amici are either U.S. citizens who have benefited from consular assistance abroad or suffered in its absence; attorneys or diplomats familiar with the importance of consular assistance; or organizations dedicated to the interests of U.S. citizens abroad.

Ambassador L. Bruce Laingen served in the United States Foreign Service from 1949 to 1987. His tours of service included assignments in Germany, Iran, Pakistan, and Afghanistan. He served as U.S. Ambassador to Malta from 1977-1979. In mid-1979, he returned to Iran for a second term as Chargé d'Affaires of the American Embassy before being held hostage in the Iran Hostage Crisis from November 4, 1979 to January 20, 1981. During the Hostage Crisis, the United States sought and secured a judgment against Iran from the International Court of Justice based on Iran's violation of the Vienna Convention on Consular Relations. Ambassador Laingen holds the Award for Valor from the Department of State, as well as the Distinguished Public Service Medal from the Department of Defense.

Lieutenant Colonel John J. Swift was a career member of the United States Air Force. On November 19, 1951, he was flying between Munich and Belgrade with three other American servicemen: co-pilot Dave H. Henderson; Engineer Sergeant Jess A. Duff; and Radio

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[1] Counsel for all parties have consented in writing to the filing of this brief, and *amici* have filed those consents with the Clerk of the Court. No counsel for a party in this case authored this brief in whole or in part, and no person or entity, other than the undersigned *amici* and their counsel, has made a monetary contribution to this brief's preparation and submission.

Operator Sergeant James A. Elam. During the flight, Soviet officials forced the aircraft to land in Hungary. Soviet and Hungarian officials captured and interrogated the men, deliberately concealing them from the United States for several weeks. The men were ultimately convicted of illegally entering Hungarian airspace in secret proceedings by a Hungarian military tribunal. At no point was Captain Swift or any of the other fliers allowed access to American consular officials, despite their own as well as U.S. protests. The airmen were finally released into American custody on December 28, 1951, but only after the United States agreed to pay the fines levied by the Hungarian military tribunal. Mr. Swift served in the U.S. Air Force until he retired with the rank of Lieutenant Colonel in 1968. Lieutenant Colonel Swift currently resides in New York and Florida.

Thomas R. Dawson served as a Peace Corps volunteer in Iran in 1966. On the way to attending a Peace Corps Conference in September of that year, Mr. Dawson and a fellow volunteer decided to explore the shore of the Caspian Sea in Astara, Iran, which was close to Soviet territory. Mr. Dawson unwittingly crossed over the unmarked border into Soviet territory, and he was promptly captured by armed soldiers, taken into custody, and interrogated for several days. He repeatedly pleaded with his captors to allow him contact with the American consulate, but to no avail, until the tenth day of his captivity when he was finally allowed contact with American officials. Mr. Dawson was eventually released to Iranian authorities, who delivered him to the American embassy in Tehran. Mr. Dawson completed his service in the Peace Corps in Micronesia, without further incident. He and his wife live in Annapolis, Maryland, where they own and operate an art gallery.

Billy Hayes is a filmmaker, producer and writer based in Los Angeles, California. Mr. Hayes spent five years in a Turkish prison during the 1970s, an ordeal described in his book, *Midnight Express*, which was made into a feature motion picture by the same name. Prompt notification of the U.S. Consulate ensured that Mr. Hayes was able to retain a lawyer, while regular consular visits throughout his incarceration provided an essential and reliable link to the outside world.

Richard Atkins practices law in Philadelphia, Pennsylvania, and has specialized for more than twenty years in assisting American citizens who run afoul of the law in foreign countries. He has testified before the Senate Foreign Relations Committee on international prisoner transfer agreements and wrote a guide to prisoner transfer treaties for the United Nations. Approximately a thousand incarcerated Americans abroad have been freed or returned with his assistance.

William D. Rogers served as Assistant Secretary of State for Inter-American Affairs from 1974-1976, and Under Secretary of State for Economic Affairs from 1976-1977. During his lengthy career as a diplomat, he played a key role in Secretary of State Kissinger's negotiations to end white rule in Rhodesia (now Zimbabwe), participated in the final Panama Canal Treaty negotiations, was special emissary for President Carter to El Salvador in 1980, co-chaired the Bilateral Commission on the Future of U.S. Mexican Relations, and was Senior Counsel to the National Bipartisan Commission on Central America. He has also served as President of the Center for Inter-American Relations in New

York, and as President of the American Society of International Law.

Founded in Geneva in 1978, **American Citizens Abroad** (ACA) is a non-profit, non-partisan organization dedicated to serving and defending the interests of U.S. citizens living outside the United States. ACA works closely to assist the U.S. Government in developing cohesive national policies dealing with Americans overseas. The organization has members in over 90 countries worldwide.

Established in 1973, the **Association of Americans Resident Overseas** (AARO) is a volunteer, non-partisan service organization representing the interests of more than 4.1 million Americans living and working abroad. Its mission is to ensure that Americans resident overseas are guaranteed the same rights and privileges as their U.S. counterparts. AARO has worked to change U.S. laws and policies so that Americans abroad receive the same benefits and protection as citizens in the United States.

Founded in 1931, the **Federation of American Women's Clubs Overseas** (FAWCO) is a non-partisan network of 74 independent organizations in 34 countries around the world, with over 17,000 members. FAWCO is a non-profit U.S. corporation and a recognized NGO with special consultative status to the UN Economic and Social Council. Among its stated purposes is to defend the rights of all Americans overseas.

Amici stress that we take no position in this brief on the moral or legal propriety of capital punishment in the abstract, or whether a sentence of death is an appropriate sanction for Mr. Medellín. Some of the *amici* are opposed to the death penalty, and some are not. All are in agreement, however, that the failure by the lower court to give a vigorous and robust scope to the protections of the Vienna Convention on Consular Relations will ultimately, and inevitably, endanger the welfare of United States citizens abroad.

SUMMARY OF ARGUMENT

Every year, a significant number of United States citizens traveling or living overseas find themselves ensnared in the criminal justice system of a foreign government. Consular assistance provides a vital service to these Americans, maintaining a desperately needed link to the outside world, and helping them navigate and understand an unfamiliar, and perhaps hostile, legal system.

The United States played a leading role in creating Article 36 of the Vienna Convention on Consular Relations, which ensures that consular officers will be allowed to perform this important service. Article 36 obligates Member States to notify detainees of their right to seek consular assistance, and to permit consular access to the detainee. But if officials in this country fail to provide foreign nationals with the full benefit of consular assistance, it is inevitable that U.S. citizens abroad will soon suffer a similar, reciprocal fate. Indeed, nothing presents a greater threat to consular assistance abroad than the failure by officials in this country to grant reciprocal assistance at home.

The United States also played a leading role in drafting the Optional Protocol Concerning the Compulsory Settlement of Disputes, which established the compulsory jurisdiction of the International Court of Justice in disputes involving parties to the Convention. The United States has frequently recognized the International Court of Justice (ICJ) as a proper forum to adjudicate disputes between states. In fact, it has invoked the jurisdiction of the World Court more often than any country in the world. Of particular significance to this dispute, the United States brought an action in 1979, following the Tehran hostage crisis. The action challenged, *inter alia*, Iran's failure to comply with Article 36 of the Convention. Under these circumstances, the United States cannot be heard to denigrate or discount the recent judgment of the International Court of Justice in *Avena*.

The failure by the lower court to provide meaningful review and reconsideration of Mr. Medellín's conviction and sentence is inconsistent with the leading role taken by the United States in creating the Convention. It is also at odds with its steadfast determination to accept the jurisdiction of the International Court of Justice. But more ominously, if the judgment below is allowed to stand, it is inevitable that U.S. citizens abroad will soon suffer in kind.

ARGUMENT

I.

The United States Played A Leading Role In Developing The Legal Protections Provided By Both The Vienna Convention And the Optional Protocol

The United States has long recognized what can scarcely be gainsaid: the Vienna Convention on Consular Relations (Convention)[2] provides vital safeguards to persons imprisoned by a contracting State.[3] But equally clear, and no less important, is the leading role the United States played in securing these essential protections. Both the Convention and the Optional Protocol Concerning the Compulsory Settlement of Disputes (Optional Protocol)[4] are substantially the product of U.S. leadership.

The Convention codified the pre-existing law on consular relations between States, an area that had previously been regulated "mainly by bilateral agreements or other less formal arrangements and by national laws."[5] In that respect, the Convention brought unity to this multiplicity by forging a single, global agreement on consular relations, thereby "contribut[ing] to the promotion of friendly relations between nations."[6] The United States actively participated in creating this agreement, and took a substantial part in drafting Article 36, the text of which was agreed to "after much debate."[7]

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[2] April 24, 1963, 21 U.S.T. 77, 596 UNTS 261.

[3] *See, e.g.*, Memorial of the United States, *Case Concerning United States Diplomatic and Consular Staff in Tehran*, I.C.J. Pleadings 1980, p. 174 ("A principal function of the consular officer is to provide varying kinds of assistance to nationals of the sending State, and for this reason the channel of communication between consular officers and nationals must at all times remain open. Indeed, such communication is so essential to the exercise of consular functions that its preclusion would render meaningless the entire establishment of consular relations."); U.S. Department of State telegram to all U.S. diplomatic and consular posts abroad concerning consular assistance for American nationals abroad, January 1, 2001, *available at* http://www.state.gov/s/l/16139.htm ("Consular notification of and access to a detained or arrested U.S. citizen has long been crucial to providing basic protective services abroad. . . Protesting unreasonable delays in consular notification is not discretionary but has long been an integral element of U.S. policy to provide protective consular services to detained Americans overseas.")

[4] April 24, 1963, 21 U.S.T. 325, 596 UNTS 487.

[5] Report of the United States Delegation to the United Nations Conference on Consular Relations, Vienna, Austria, March 4 to April 22, 1963, reprinted in S. Exec. Doc. E, 91st Cong., 1st Sess., May 8, 1969, at 41 (hereinafter "Report").

Significantly, the United States recognized even before ratification that vigorous enforcement of Article 36 would provide important reciprocal benefits to U.S. citizens overseas. The Report of the U.S. Delegation to the United Nations Conference on Consular Relations notes that Article 36(1)(b), which requires that "[arresting] authorities shall inform the person concerned without delay of his rights under this sub-paragraph,"[8] establishes a "requirement which is not beyond means of practical implementation in the United States, and, at the same time, is useful to the consular service of the United States in the protection of our citizens abroad."[9]

While the Convention therefore represents an important codification of the obligation to provide consular

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[6] Report at 41.

[7] Report. at 59.

[8] Convention, art. 36(1)(a).

[9] Report at 60. Elsewhere, the Report notes that "[t]he standard of treatment required by the present Convention conforms in all essential respects to the views of the United States as to what is or should be required by international law and practice. *Id.* at 74.

notification, the United States additionally recognizes that consular notification is not dependent upon the legal protections of the Convention alone:

> Consular notification is in our view a universally accepted, basic obligation that should be extended even to foreign nationals who do not benefit from the VCCR or from any other applicable bilateral agreement. Thus, in all cases, the minimum requirements are to notify a foreign national who is arrested or detained that the national's consular officials may be notified upon request; to so notify consular officials if requested; and to permit consular officials to provide consular assistance if they wish to do so.[10]

The United States likewise played an integral role in drafting the Optional Protocol, which provides in relevant part that any "[d]isputes arising out of the interpretation or application of the Convention *shall* lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the Present Protocol."[11] Indeed, this language derives substantially from the original proposal of the United States, which provided that "[a]ny dispute arising from the interpretation or application of this Convention shall be submitted at the request of either of the parties to the International Court of Justice unless an alternative method of settlement is agreed upon."[12] At the Conference, the United States voted *against* a motion by the Yugoslav delegation that would have weakened the compulsory jurisdiction of the ICJ.[13] While the final language of the Protocol is slightly different than the language proposed by the United States, it clearly provides for the compulsory jurisdiction of the ICJ, precisely as urged by the United States.

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[10] Bureau of Consular Affairs, U.S. Department of State, Consular Notification and Access, Instructions for Federal, State, and other Local Law Enforcement and Other Officials Regarding Foreign Nationals in the United States and the Rights of Consular Officials To Assist Them 44 (no date of publication available, "[t]he Department of State expects to update it every 2-5 years"), *available at* http://travel.state.gov/law/consular/consular_744.html.

[11] Protocol, art. 1 (emphasis added).

That the United States would have argued so assiduously for an Optional Protocol that provided for the compulsory jurisdiction of the ICJ should come as no surprise: the United States has been involved in more cases at the ICJ than any other nation in the world, and has invoked the jurisdiction of the World Court more often than any other State.[14] Two such actions, however, are of particular interest to *amici*.

On November 19, 1951, a C-47 cargo aircraft of the

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[12] Report at 72.

[13] The Yugoslav delegation proposed adding a paragraph to the U.S. proposal, providing that "[a]ny contracting party may, at the time of signing or ratifying this Convention or of acceding thereto, declare that it does not consider itself bound by paragraph 1, of this article [the United States proposal]. The other contracting parties shall not be bound by the said paragraph with respect to any contracting party which has formulated such a reservation." *Id.* at 73.

[14] The official website for the ICJ lists all cases from 1946 to the present. *See* http://www.icj-cij.org/icjwww/idecisions.htm.

85th Air Depot Wing of the U.S. Air Force carrying four American airmen was making a routine flight from Erding Air Force Base in Germany to Belgrade, Yugoslavia. During the flight, the plane accidentally crossed into Hungarian airspace and was "brought down by Soviet authorities in Hungary and subsequently turned over with its crew to Hungarian authorities."[15] American authorities searched in vain for the missing fliers until December 2, 1951, when Russia's *Tass* news agency revealed that the aircraft and its crew had been in Hungarian and Soviet custody since its disappearance.[16] Although U.S. State Department officials immediately sought the release of the fliers, Hungarian officials would not permit it, nor, despite repeated requests, would they let American officials speak with the men.[17]

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[15] Press Release, United States Department of State, U.S. Asks Return of Property Seized in 1951 Plane Incident, (December 10, 1952), *in* 27 Department of State Bulletin 980, 980-84 (1952).

[16] *Budapest v. U.S.*, N.Y. Times, December 9, 1951, at 168 *available at* http://www.il.proquest.com/proquest/ (ProQuest Historical Newspapers, N.Y. Times (1851-2000)); *see also*, *U.S. Promises Action to Free Seized Fliers*, Washington Post, December 4, 1951, at 1, *available at* http://www.il.proquest.com/proquest/ (ProQuest Historical Newspapers, Washington Post (1877-1988)):

> Also expected is a protest over the fact that the Communist authorities kept silent for nearly two weeks while search planes combed Yugoslavia… Press Officer Lincoln White said at the State Department that the Soviet charges are 'apparently a cover-up for the fact that despite repeated representations by the American Chargé d'Affaires at Budapest, George Abbott, requesting information concerning the plane, the Hungarian authorities repeatedly said they had no information.

[17] Press Release, U.S. Department of State, U.S. Seeks Release of American Fliers Held in Hungary, (December 28, 1951), *in* 26

On December 23, 1951, Hungary announced that the four men had been tried in secret by a Hungarian military court and sentenced to a fine of almost $30,000 each, or three months imprisonment, for "intentionally violating the Hungarian border."[18] "The trial was secret, and the United States was given no opportunity to be present through any representative...."[19] In a speech given to the United Nations the following year, Senator and U.S. Representative to the General Assembly Theodore Green observed:

> What concerns us most here is the stubborn and implacable manner in which both Soviet and Hungarian officials refused U.S. representatives repeated requests for access to the airmen. Not only this, but both our diplomats and the airmen were prevented from obtaining their own legal counsel in the trial which took place.[20]

Department of State Bulletin 7 (1952).

[18] *U.S. Air Crew Fined, Hungarian Border "Violation," 30,000 Dollars Each*, London Times, December 24, 1951, at 4, *available at* http://www.galegroup.com/Times/ (Times of London Digital Archive, 1785-1985).

[19] Press Release, U.S. Department of State, U.S. Asks Return of Property Seized in 1951 Plane Incident, (December 10, 1952), *in* 27 Department of State Bulletin 980, 980-84 (1952).

[20] Statement by Senator Theodore F. Green, U.S. Representative to the General Assembly, United States Department of State, Soviet Harassment of Foreign Diplomats, (October 29, 1952), *in* 27 Department of State Bulletin 787 (1952).

Hungary released the American airmen on December 28, 1951. Upon their release, the United States promptly closed the Hungarian consulates in New York and Cleveland and barred Americans from traveling to Hungary.[21] Secretary of State Dean Acheson placed the blame for this retaliation squarely upon Hungary's failure to "live up to the accepted standards of international practice with regard to the right of consular officers to exercise protective functions in behalf of nationals of their country."[22]

The incident also provided the occasion for this country's first litigation in the World Court. On March 17, 1954, the United States initiated proceedings at the ICJ against Hungary and the Soviet Union, claiming the failure to allow consular access and assistance had deprived the United States and its citizens of their respective right to provide and receive consular assistance. "International law," the United States correctly observed, "recognizes the right of the government in such matters to act on behalf of its nationals and is applied in Hungarian judicial practice."[23]

Significantly, the cases against Hungary and the Soviet

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[21] Press Release, U.S. Department of State, U.S. Orders Closing of Hungarian Consulates, (December 29, 1951), *in* 26 Department of State Bulletin 7 (1952).

[22] Press Release, U.S. Department of State, Statement by Secretary Acheson, (December 28, 1951), *in* 26 Department of State Bulletin 7 (1952).

[23] Application Instituting Proceedings and Pleadings (U.S. v. Hungary; U.S. v. U.S.S.R.), 1953 I.C.J. Pleadings, (*Treatment in Hungary of Aircraft and Crew of United States of America*) Annex I at 36 (February 16, 1954).

Union could not proceed because those countries refused to accept the World Court's jurisdiction. Upon the removal of the case from the Court's docket, the United States lamented:

> This conduct on the part of the two defendant Governments merely demonstrates again that they have no compunctions in publicly asserting principles of international law and order but in then refusing to permit those principles to be applied to their own conduct. *The U.S. Government must of course accept the decision of the International Court of Justice.*[24]

The United States returned to the ICJ in 1979 when it submitted an application to the World Court against the Islamic Republic of Iran "concerning the seizure and holding as hostages of members of the United States diplomatic and consular staff and certain other United States nationals."[25] In its application, the United States accused Iran of several treaty violations, including violations of Article 36 of the Convention, and requested that the ICJ "adjudge and declare" that Iran was under a "particular obligation immediately to secure the release of all United States nationals currently being detained."[26] The ICJ indicated provisional measures against Iran on December 15, 1979, and entered a final judgment in favor of the United States

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[24] Press Release, U.S. Department of State, U.S. Applications in C-47 Case Removed From Calendar of ICJ, (July 16, 1954), *in* 31 Department of State Bulletin 130 (1954).

[25] *Case Concerning United States Diplomatic and Consular Staff in Tehran (U.S.A. v. Iran)*, 1980 I.C.J. 3 (Judgment of 24 May).

[26] *Id.* at 6.

May 24, 1980. Thereafter, the United States insisted the decisions of the ICJ were binding in all respects, and that Iran must comply with the Court's judgment.[27]

In sum, having played a prominent role in drafting the Convention, having successfully led the international charge for the compulsory jurisdiction of the ICJ, and having sought relief from that Court more than any other country, the United States cannot be heard now to disparage or discount its judgment.

II.

Failure To Provide Vigorous And Robust Enforcement Of The Vienna Convention Could Have Grave Consequences For U.S. Citizens Abroad

In a legal system that has no independent enforcement mechanism, the integrity of the process depends on nothing less than the acceptance of mutually shared obligations. Behind this acceptance is the essential lesson of diplomatic experience: so long as they are able, nations will respond in kind to the treatment they receive. This notion of reciprocity is both an inescapable reality, and the animating force to a bedrock principle of international law – *pacta sunt servanda* ("pacts must be respected") – which captures the requirement that nations must observe their agreements in good faith.[28] In matters both mundane and monumental, membership in the international community implies a solemn obligation to comply with treaties in good faith, "undertaking to do (or not to do) unto others what they would have done (or not done) unto them."[29]

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[27] *U.S. Urges the Iranians to Obey Court Decision*, N.Y. Times, May 25, 1980, pg. 9: "The State Department said today that the decision by the International Court of Justice ordering Iran to release the American hostages and pay compensation to the United States was binding on Iran, and it called on the Teheran Government to carry out its provisions."

In the present context, the importance of reciprocity cannot be overstated. Over the last 30 years, the number of Americans living overseas has increased dramatically. The State Department now estimates that "[a]pproximately 3.2 million Americans reside abroad, and Americans make about 60 million trips outside the United States each year."[30] The State Department also reports that over 2,500 Americans are arrested abroad annually.[31] And this total does not include the number of citizens detained outside the formal criminal justice process. All told, roughly 6,000 Americans are arrested or detained abroad every year.[32] The largest number of these – 400 – are detained in Mexico.[33]

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[28] *See, e.g.*, Restatement (Third) of Foreign Relations Law of the United States §321 cmt. a (1987) (*pacta sunt servanda* "lies at the core of the law of international agreements and is perhaps the most important principle of international law.")

[29] Louis Henkin, *How Nations Behave* 30 (2d ed. 1979).

[30] Bureau of Resource Management, U.S. Department of State, *FY 2003 Performance and Accountability Report* (2003), *available at* http://www.state.gov/m/rm/rls/perfrpt/2003/html/29037.htm.

[31] Office of Overseas Citizens Services, Bureau of Consular Affairs, U.S. Department of State, Department of State Publication 10252, *Overseas Citizens Services*, (2002), *available at* www.internationalbenefits.com/travel-tips/overseas-citizens-services.htm.

[32] Kevin Herbert, *The Terrorist Threat to the American Presence Abroad: A Report of a Consultation of The Critical Incident Analysis Group and The Institute for Global Policy Research, Part II. 2. Threat to Citizens Overseas*, University of Virginia, April 12-13, 1999, *available at* www.healthsystem.virginia.edu/internet/ciag/reports/report_terr_citizens.cfm (Kevin Herbert is from the Office of Overseas Citizens Services, U.S. Department of State).

These statistics are both descriptively and normatively instructive: they demonstrate that at one time or another many U.S. citizens will find themselves overseas in need of legal help, and they suggest that a failure to provide foreign nationals in the United States with vigorous and robust enforcement of the Vienna Convention could have grave consequences for U.S. citizens abroad. This risk to U.S. citizens has not gone unnoticed.

The State Department Foreign Affairs Manual instructs American consuls abroad to secure "immediate [consular] notification, no matter what the language of applicable treaties legally requires."[34] Apart from ensuring the timely provision of legal information, prompt notification and access "is necessary to forestall physical abuse of the prisoner. . . or to ascertain when such abuse has occurred."[35] American consuls are required to determine if there has been

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[33] Press Statement by James P. Rubin, Spokesman, U.S. Department of State (Apr. 15, 1998), *available at* www.hri.org/news/usa/std/1998/98-04-15.std.html.

[34] U.S. Department of State Foreign Affairs Manual (1984), 7 FAM 411.3, *Relations with Local Authorities*.

[35] *Id.*, 7 FAM 412, *Access*.

"any physical abuse or violation of rights"[36] and to look for signs of ill-treatment, bearing in mind that "many forms of physical abuse, including systematic torture, are calculated to leave no physical evidence."[37] Consular officers also should arrange for detainees to be "examined by a private medical doctor to determine the extent and probable cause of any injury"[38] when appropriate and observe "the physical conditions under which the prisoner is being held."[39] Finally, the consulate is required by law "to assist U.S. citizens abroad who, as a result of their incarceration, cannot secure the minimal medical treatment or dietary regimen necessary to sustain an acceptable standard of life."[40]

The State Department has repeatedly stressed to domestic officials the vital importance of reciprocal enforcement of the Convention. As Governor of Texas, George W. Bush received a letter from Secretary of State Madeleine Albright that noted:

> As Secretary of State, ensuring the protection of American citizens abroad – including over 300 imprisoned Texans last year – is one of my most important responsibilities. Our ability to provide such assistance is heavily dependent, however, on the extent to which foreign governments honor their consular notification obligations to us. At the same time, we must be prepared to accord other countries the same scrupulous observance of consular notification requirements that we expect them to accord the United States and its citizens abroad.[41]

On another occasion, Secretary Albright noted that the State Department stood ready to provide a range of assistance to Americans detained abroad, including "attempting to ensure that they understand the foreign country's legal system and their legal options, by helping them obtain qualified legal representation, by communicating with their families if they wish, and by taking other steps to improve the prisoner's situation and in some cases, to influence the outcome of the proceedings."[42] She has also cautioned that non-compliance with the orders of the International Court of Justice "could be seen as a denial by the United States of the significance of international law and the court's processes in its international relations and thereby limit our ability to insure that Americans are protected when living or traveling abroad."[43]

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[36] *Id.*, 7 FAM 414.1, *Abuse of Prisoners*.

[37] *Id.*, 7 FAM 414.1-1, *Examination by an Officer*.

[38] *Id.*, 7 FAM 414.1-2, *Examination by Independent Physician in Cases of Abuse*.

[39] *Id.*, 7 FAM 414.2, *Conditions of Detention*.

[40] *Id.*, 7 FAM 451, *General Policy (Emergency Medical and Dietary Assistance)*.

[41] S. Babcock, *The Role of International Law in United States Death Penalty Cases*, 15 LJIL 367, 376 (2002) (quoting from Secretary Albright's letter to Governor Bush, dated November 27, 1998).

[42] Letter from Madeleine Albright, Secretary of State, to Victor Rodriguez, Chairman of the Texas Board of Pardons and Paroles, quoted in footnote 211 of the Memorial of Mexico, *Case Concerning Avena and Other Mexican Nationals*, I.C.J. Pleadings (2003), *available at* www.icj-cij.org/icjwww/idocket/imus/imusframe.htm.

[43] Linda Greenhouse, *Court Weighs Execution of Foreigner*, N.Y. Times, April 14, 1998, page 14 (quoting from Secretary Albright's letter to

U.S. consular officers overseas have been instructed to insist on scrupulous observance of Article 36 rights, in order to carry out their "primary mission" of protecting Americans:

> If we are to be effective in protecting the rights of U.S. citizens detained or otherwise in distress abroad, we must first know their situation and we must be vigilant in personally assisting them. By consistently protesting violations of notification and access obligations, we reinforce with the host government the seriousness with which we take our consular responsibilities and underscore our efforts to protect our citizens against any abuse, mistreatment or discrimination.[44]

Secretary Albright's position is neither surprising nor unusual. It has been consistently echoed by others at the State Department – most recently by William H. Taft, IV, the Department's Chief Legal Advisor. As he observed in a letter to the Oklahoma clemency officials presiding over the recent case of Osbaldo Torres, Article 36 of the Convention "is not only of importance to foreign nationals in the United States. It serves to protect all Americans who travel or live abroad."[45]

Virginia Governor James Gilmore).

[44] U.S. Department of State telegram to all U.S. diplomatic and consular posts abroad concerning consular assistance for American nationals abroad, *supra*, fn. 3.

[45] S. Lynne Walker, *Okla. case pits U.S. against world court*, San Diego Union-Tribune, May 7, 2004 (quoting Mr. Taft's letter to the Oklahoma Pardon and Parole Board), *available at*

Other State Department officials have voiced the same sentiment.[46]

Robust enforcement of the Vienna Convention is not merely the concern of cabinet level officials. On the contrary, the law of unintended consequences in this field has been the subject of frequent judicial comment. In *Standt v. City of New York*, for example, the Court observed:

> The United States has repeatedly invoked Article 36 on behalf of American citizens detained abroad who

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www.signonsandiego.com/uniontrib/20040507/news_1n7penalty.html.

[46] For example, State Department Spokesman James P. Rubin stated that "[c]onsular notification is no less important to [other countries] than to U.S. nationals outside the United States. We fully appreciate that the United States must see to it that foreign nationals in the United States receive the same treatment we expect for our citizens overseas. We cannot have a double standard." Press Statement by James P. Rubin, Spokesman, U.S. Department of State (Nov. 4, 1998), *available at* http://secretary.state.gov/www/briefings/statements/1998/ps981104.html. State Department Spokesman R. Nicholas Burns captured perfectly the obligation imposed by reciprocity:

> A lot of American citizens who are tourists … find themselves in trouble, find themselves ill or in prison because they didn't understand the legal system or they came crosswise with the system, and the only people they can turn to for help are American diplomats. So it's critically important to the average American -- and millions of Americans travel overseas every year -- that they have Americans who can help them when they get into trouble. It happens all the time.

Press Statement by R. Nicholas Burns, Spokesman, U.S. Department of State (Sept. 29, 1995), *available at* http://www.hri.org/docs/statedep/1995/95-09-29.std.html.

> have not been granted the right of consular access. ... It is critical for the judiciary to recognize VCCR rights of foreign nationals detained in the United States for the United States to continue its success in invoking the Vienna Convention on behalf of U.S. citizens detained abroad.[47]

Judge Butzner, of the Fourth Circuit Court of Appeals, expressed a similar sentiment during the *Breard* litigation:

> United States citizens are scattered about the world – as missionaries, Peace Corps volunteers, doctors, teachers and students, as travelers for business and for pleasure. Their freedom and safety are seriously endangered if state officials fail to honor the Vienna Convention and other nations follow their example. Public officials should bear in mind that international law is founded upon mutuality and reciprocity.[48]

In another case, one jurist asked, perhaps only rhetorically:

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[47] 153 F. Supp. 2d 417, 427 (S.D.N.Y. 2001).

[48] *Breard v. Pruett*, 134 F.3d 615, 622 (4th Cir. 1998)(Butzner J., concurring)(internal quotations omitted); *see also U.S. v. Carillo*, 70 F. Supp. 2d 854, 860 (N.D. Ill. 1999)("Treaty violations not only undermine the 'Law of the Land,' but also international law, where reciprocity is key. If American law enforcement officials disregard, or perhaps more accurately, remain unaware of the notification provision in Article 36, then officials of foreign signatories are likely to flout those obligations when they detain American citizens.").

> Why should Mexico, or any other signatory country, honor the Treaty if the U.S. will not enforce it? The next time we see a *60 Minutes* piece on a U.S. citizen locked up in a Mexican jail without notice to any U.S. government official we ought to remember these cases.[49]

Relevant organizations whose members will be most affected by a restrictive interpretation of the Convention have also voiced their concerns. The Southern Baptist International Mission Board, for example, oversees 4,200 missionaries and 15,000 volunteers in 130 countries. The president of the organization noted his concerns in urging former Virginia Governor George Allen to commute the sentence of an inmate on Virginia's death row. "I am horrified to think of the potential repercussions in Mexico and other countries, and its potential harm to our missionaries' that could occur because the Commonwealth of Virginia failed to honor the obligations of the Vienna Convention."[50]

Finally, as recent events in India and China make plain, the danger to U.S. citizens, though perhaps more pronounced in these turbulent times, does not arise solely from the random acts of rogue states. Only last month, Avnish Bajaj, a naturalized American citizen and CEO of

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[49] *Flores v. State*, 994 P.2d 782, 788 (Okla. Crim. App. 1999)(Chapel, J., concurring in result); *see also id.* (court's narrow vision of the Convention "puts U.S. citizens traveling abroad at risk of being detained without notice to U.S. consular officials.").

[50] Frank Green, *Mission Chief Urges Allen to Commute Sentence*, Richmond Times-Dispatch, Sept. 17, 1997, at A1.

Baazee.com, the wholly owned Indian subsidiary of eBay, was arrested on charges that his company unwittingly permitted pornographic materials featuring minors on its website.[51] Indian law enforcement officials arrested Mr. Bajaj, who had been cooperating with authorities investigating the source of the pornography, claiming he violated India's Information Technology Act of 2000, which makes a criminal offense "publishing, transmitting, or causing to publish any information in electronic form, which is obscene."[52] Richard Boucher, spokesperson for the U.S. State Department, noted that "(t)his situation is one of concern at the highest levels of the U.S. government."[53] American officials provided Bajaj with consular assistance, and at least one U.S. diplomat attended a hearing at the Delhi High Court where Bajaj successfully appealed a lower court decision that he remain in jail without bail.[54]

Similarly, Gao Zhan, a sociologist and permanent resident based at American University, was traveling with her young son in China when she was arrested for

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[51] Paul Watson, *India Roiled by Internet Sex Case*, L.A. Times, December 22, 2004, *available at* http://www.boston.com/news/world/asia/articles/2004/12/22/india_roiled_by_internet_sex_case/.

[52] Rajesh Mahapatra, *Court Grants Bail to eBay's Indian Exec*, Assoc. Press, December 21, 2004, *available at* http://wtop.com/index.php?nid=108&sid=367373.

[53] *Id.*

[54] Paul Watson, *India Roiled by Internet Sex Case*, L.A. Times, December 22, 2004, *supra*.

espionage.[55] She and her son, an American citizen, were held *incommunicado* by China's state security ministry, without notice to the U.S. Embassy. When her husband came to China seeking information, he too was detained and threatened.[56] These events prompted the House of Representatives to pass House Resolution 160, unanimously condemning the acts of the Chinese government.[57]

In sum, *amici* stake their argument on the mutually binding obligations of international treaties. Responsible officials in this country have repeatedly expressed the concern that a failure to honor Article 36 presents grave risks to American citizens living and traveling abroad. The Founders expressed a like concern when they foresaw what has eluded the lower courts in this case: membership in the international community implies a reciprocal obligation; but if it is an obligation, it is one that redounds most to the benefit of the citizens of this country.[58] We urge the Court to recognize the same obligation today.

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[55] *See US Family Detained in China*, BBC News, Mar. 21, 2001, *available at* http://news.bbc.co.uk/2/hi/asia-pacific/1233163.stm; Ann Scott Tyson, *Where's Gao? Disappeared in China: 100 days and counting*, Christian Science Monitor, June 5, 2001, *available at* http://www.csmonitorservices.com/csmonitor/archivesearch.jhtml.

[56] *See id.*

[57] H.R. Res. 160, 107th Cong. (2001).

[58] *The Federalist No. 64*, at 392 (Clinton Rossiter ed., 2003):

> Others, though content that treaties should be made in the mode proposed, are averse to their being the SUPREME laws of the land. They insist, and profess to believe, that treaties like acts of assembly, should be repealable at pleasure. This idea seems to

Conclusion

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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January 22, 2005

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be new and peculiar to this country, but new errors, as well as new truths, often appear. These gentlemen would do well to reflect that a treaty is only another name for a bargain, and that it would be impossible to find a nation who would make any bargain with us, which should be binding on them ABSOLUTELY, but on us only so long and so far as we may think proper to be bound by it.

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In The
Supreme Court of the United States

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JOSE ERNESTO MEDELLIN,

Petitioner,

v.

DOUG DRETKE, DIRECTOR, TEXAS
DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,

Respondent.

◆

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Fifth Circuit**

◆

BRIEF OF LIBERTY LEGAL INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

◆

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Curiae Liberty Legal Institute is a non-profit law firm dedicated to the preservation of first amendment rights and religious freedom. In its commitment to the protection of religious liberty of all faiths, the Institute represents religious institutions and individuals across the country. The Liberty Legal Institute is increasingly aware that international law is playing a role in decisions by the United States Supreme Court in a diverse array of issues, including issues regarding domestic public policy. While international law has played a distinct role in our jurisprudence since the formation of this Nation, it is important to recognize that our domestic jurisprudence superbly serves this Nation, its citizens and visiting foreign nationals.

The customary international rule of exhaustion of local remedies compels federal courts to first exhaust all domestic legal analysis before engaging in the application of foreign sources of law. *Amicus* believes very strongly that our national sovereignty depends upon federal courts restraining themselves to bifurcate analysis in all cases where international law may be seen as providing helpful guidance. Such bifurcation of analysis protects the integrity of our judicial system and highlights exactly how the Court is employing international law. While the social utility of relying upon international sources in various areas of the law, such as domestic constitutional jurisprudence, remains controversial, it is the position of *amicus* that this Court should at least put lower courts and practitioners on notice of exactly how international law may be applied. Bifurcation will ensure the consistency the legal community has come to expect from the judiciary while not foreclosing the application of international law in appropriate circumstances.

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[1] The parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of this Court. Pursuant to this Court's Rule 37.6, none of the counsel for the parties authored this brief in whole or in part and no one other than *amicus* or its counsel contributed money or services to the preparation and submission of this brief.

◆

SUMMARY OF THE ARGUMENT

The Vienna Convention on Consular Relations does not provide for an individual remedy, but merely provides for remedies between nation-states. Because the Vienna Convention itself does not create an individual remedy and the International Court of Justice does not provide standing to individuals, the *Avena* court fell far short of requiring any specific extraordinary remedy for an individual. This Court is left to apply domestic law of its choosing to satisfy the "review and reconsideration" recommendation in *Avena*.

If this Court chooses to review and reconsider the conviction and sentence of Petitioner in light of the Article 36 violation, current domestic jurisprudence provides an adequate remedy. The exceptions to the procedural default rule give this Court the avenue to consider the Article 36 violation without resorting to reliance upon a decision by an international tribunal.

To avoid unnecessary reliance upon international sources for authority and comply with the binding international customary rule of exhaustion of municipal remedies, this Court should adopt a bifurcated analysis approach.

The Court should begin by analyzing any issue presented using purely domestic sources and legal analysis. Only if an adequate resolution cannot be found in domestic legal analysis should the Court turn to international sources. Using this procedural device, this Court could balance the requirement that domestic legal analysis be final before international sources are sought and the desire by some members of the Court to look toward international sources for guidance when necessitated. Such a balance creates consistency within our domestic judicial system and ensures that purely domestic issues are resolved using purely domestic legal analysis.

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ARGUMENT

I. The *Avena* decision does not bind this Court to fashion an extraordinary individual remedy for Petitioner.

Public international law is the legal relationship undertaken between nation-states. States remain sovereign and choose the manner in which they are bound by international law, save *jus cogens*, a limited class of legal obligations states may not avoid. When states undertake to form an agreement, or treaty, each state incurs obligations to the other and remedies for a breach or material breach of that agreement are fashioned. As is the case with the Vienna Convention on Consular Relations, *opened for signature* April 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261, treaties between sovereigns are almost always obligations owed state to state, not state to individual or individual to state.

A. The Vienna Convention does not provide for an extraordinary remedy for an individual.

The Vienna Convention does not provide for an extraordinary individual remedy. This is not to say that the Vienna Convention is not self-executing under the domestic doctrine of self-execution. However, whether the Vienna Convention requires further implementing legislation to be the "law of the land" under the Supremacy Clause misses the point. Whether or not such implementing legislation is necessary, the Vienna Convention itself provides no remedy for any breach that an individual may invoke. The only remedy for a violation of the Vienna Convention is presented in the Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, *opened for signature* April 24, 1963, 21 U.S.T. 325, 596 U.N.T.S. 487. This remedy, of course, only applies to states.[2] Thus, the Vienna Convention may confer rights to individuals, but it does not itself create a remedy for that right.[3]

The Vienna Convention itself, within the four corners of the document, specifically reads in the preamble, "[r]ealizing that the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of functions by consular posts on behalf of their respective States." Thus, the Vienna Convention alone does not provide a remedy for a violation of any particular individual's rights, save the Optional Protocol. Only if a state ratifies the Optional Protocol may it, as the state, pursue a remedy against another ratifying state at the International Court of Justice.

B. The *Avena* decision falls short of mandating an extraordinary remedy for individuals.

Mexico availed itself of the only remedy available under the Vienna Convention, by seeking an opinion from the International Court of Justice. The decision in *Avena and Other Mexican Nationals* (Mex. v. U.S.), 2004 I.C.J. 1 (Mar. 31) (hereinafter *Avena*) fell far short of Mexico's desire in its fourth submission to full reparation in the form of *restitutio in integrum*. *See id.* at ¶¶ 116-125. First and foremost, the International Court of Justice specifically did not adopt Mexico's contention that the rights in the Vienna Convention rise to the level of "human rights" and "neither the text nor the object and purpose of the Convention, nor any indication in the *travaux preparatoires*, support the conclusion." *Id.* at ¶ 124. Thus, the International Court of Justice specifically declined to fashion a specific extraordinary remedy for individuals, but rather left it "for the courts of the United States to examine the facts, and in particular the prejudice and its causes, taking account of the violation of the rights set forth in the Convention."[4] *Id.* at ¶ 122. Such "review and

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[2] The Optional Protocol requires ratifying states to submit their cause before the International Court of Justice, which only allows states to appear as parties. *See* Statute of the International Court of Justice, art. 34(1), *opened for signature* June 26, 1945, 59 Stat. 1031.

[3] Just as 42 U.S.C. § 1983 provides a judicial vehicle upon which rides constitutional claims so that a remedy may be fashioned, so too must the Vienna Convention ride on some legislation to fashion a remedy.

[4] Contrast this with the requirement for the famous *Miranda* warnings whereby a conviction based upon a confession obtained in

(Continued on following page)

reconsideration" in light of the Article 36 violations is all that is suggested by the International Court of Justice.[5] This "review and reconsideration" decision by the ICJ is not inconsistent with already established judicial practice in the United States regarding the procedural default rule.

C. It is unnecessary for this Court to fashion an extraordinary individual remedy for an Article 36 violation.

Even though Petitioner's right does not rise to the level of a "human right," amicus assumes for purposes of this brief that Petitioner nevertheless suffered the impingement of a right for which the United States as a sovereign is ultimately responsible. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED

STATES § 711(b) (1987). For such a violation, this Court and the International Court of Justice may look to four sources to fashion a remedy. *Id.* at § 713(2).

First, a tribunal may look to an "international agreement between the person's state of nationality and the state responsible for the injury." *Id.* at § 713(2)(a). The Vienna Convention is such an agreement and as discussed above, the Convention does not provide for an individual remedy as other treaties may provide. That is why the ICJ did not attempt to mandate a specific remedy and instead recommended "review and reconsideration," because no such remedy exists under international law.

Second, a tribunal may look to a remedy provided by "the law of another state." *Id.* at 713(b)(c). Petitioner has not advanced that the law of another state provides any specific individual remedy for an Article 36 violation and neither did the ICJ.

Third, a tribunal may look to a remedy provided by "agreement between the person injured and the state responsible for the injury." *Id.* at § 713(2)(d). There is no such agreement present in this case.

Finally, a tribunal may look to "the law of the state responsible for the injury." *Id.* at 713(2)(b). Although the *Avena* court did not specifically state as much, it appears that the ICJ's opinion relies exclusively upon this source for a remedy. The *Avena* court merely recommended the United States undertake "review and reconsideration of the convictions and sentences." *Avena*, at ¶ 153. In addition,

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violation of *Miranda v. Arizona*, 384 U.S. 436 (1966) must be overturned. The *Avena* decision explicitly rejects the notion that the judicial proceedings were so tainted by the Article 36 violation that the convictions and sentences must be overturned. Such a finding by the *Avena* court would certainly require a remedy in the form of *restitutio in integrum*, as Mexico argued. However, the *Avena* court wholly rejected Mexico's submission in that regard. *See Avena*, ¶ 125.

[5] It is important to note that the International Court of Justice is not a link in the judicial chain of the system of justice for the United States. Indeed, the United States has taken a position hostile to the International Court by withdrawing from the voluntary jurisdiction of the court. *See* U.S. Dep't of State, *U.S. Terminates Acceptance of ICJ Compulsory jurisdiction*, DEP'T OF STATE BULL., Jan. 1986, at 67 (letter from U.S. Secretary of State to U.N. Secretary-General, Oct. 7, 1985). There is no *stare decisis* for the International Court and all of its opinions have no binding force beyond the immediate matter and do not create required precedent. *See* Statute of the International Court of Justice, art. 59. In fact, it is clear that enforcement of decisions of the International Court of Justice falls to the Security Council, not internal judicial systems of various states. *See* United Nations Charter, *opened for signature* June 26, 1945, art. 94(2), 59 Stat. 1031.

the ICJ left it to the United States to decide under its own domestic law the effect of the Article 36 violation upon the conviction and sentence of petitioner.[6] Thus, it is for this Court to determine under our own package of domestic rules the measure of the effect of any Article 36 violation upon the conviction and sentence of petitioner.

Petitioner, Mexico and the ICJ seem to agree that the procedural default rule, a purely domestic rule, prohibits such review and reconsideration. It clearly does not. This Court, in determining whether the Article 36 violation before it in this case rises to the level that requires the invocation of one of the pre-existing exceptions to the procedural default rule, is conducting the "review and reconsideration" recommended by the decision in *Avena*.

II. The procedural default rule is not an absolute bar to courts reviewing Vienna Convention violations.

A. The procedural default rule carries with it a package of exceptions designed to prevent an injustice.

This Court made it "explicit" that "[i]in all cases in which a state prisoner has defaulted his federal claims in state court . . . federal habeas review of the claims is

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[6] "The Court affirms that the case before it concerns Article 36 of the Vienna Convention and not the correctness as such of any conviction or sentencing. The question of whether the violations of Article 36, paragraph 1, are to be regarded as having, in the causal sequence of events, ultimately led to convictions and severe penalties ***is an integral part of criminal proceedings before the courts of the United States and is for them to determine in the process of review and reconsideration.*"** *Avena*, at ¶ 122. (emphasis added)

barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman v. Thompson*, 501 U.S. 722, 750 (1991); *see also Wainwright v. Sykes*, 433 U.S. 72, 87 (1977).[7] The purpose of these two exceptions is clear: they are designed to ensure that procedural rules do not subvert our overarching desire to achieve real justice. This Court has clearly applicable domestic law at its disposal to adjudicate this case without resorting to international law.

B. This Court, in reviewing and reconsidering this case, needs only to consider whether the Article 36 violation falls within one of the pre-established exceptions to the procedural default rule and need not fashion an extraordinary remedy for any such violation.

Petitioner attempts to put this Court in an awkward position. Petitioner's argument is focused around the contention that the *Avena* decision "supplies the rule of decision in this case." Petitioner's brief, p. 41. There is a false premise built into this argument: if the Court desires to give effect to the suggestion of review and reconsideration by the *Avena* court, then it must discard the procedural default rule entirely in order to properly review and reconsider the Article 36 violation. This is untrue. This Court may analyze this case in light of the exceptions to the procedural default rule to determine whether an Article 36 violation rises to the level of a miscarriage of justice or is a cause that gave rise to prejudice in the state court proceedings.[8] Such a "review and reconsideration" is grounded in domestic law and does not force this Court to bow to the will of an external body.

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[7] In addition, the default rule does not apply when the alleged constitutional violation results in the conviction of the innocent. *See Murray v. Carrier*, 477 U.S. 478 (1986).

III. This Court should adopt a procedural rule of bifurcated analysis when invoking or relying upon international law – requiring the Court to first analyze any issue using purely domestic legal sources and then, only if such domestic legal sources are found inadequate, resorting to international legal resources.

A. Courts and practitioners need specific guidance from this Court regarding the role of international law in our domestic jurisprudence.

There is much confusion when this Court engages in domestic legal analysis that is "informed" by international legal sources. This confusion is unnecessary. Whatever the perceived value of international sources, it is incumbent upon this Court to bifurcate its analysis. The Court should first look to see if a question may be answered using purely domestic law. Only if domestic law has been completely exhausted should the Court turn to international sources. Such a procedural rule of bifurcated analysis will serve three essential policy purposes.

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[8] **It seems fairly obvious that Petitioner's counsel would seek some remediation for Petitioner's conviction and sentence along all avenues judicially available. The fact that Petitioner did not raise the issue that the Article 36 violation falls within one of the exceptions to the procedural default rule before this Court or below renders the unmentioned quite obvious. It seems from the briefing that the real interests of Petitioner diminish before the all important cause of converting the International Court of Justice into the Supreme Court and reducing the United States Supreme Court to the role of a mere judicial subsidiary.**

First, such bifurcated analysis will further the development of a consistent body of law. Jurists and legal professionals will be able to depend on the stability of the law as it is crafted and molded in our domestic legal system. The international legal system, with so many moving parts, does not provide the same level of consistency and predictability. Second, it will curb the fear of so many that international law is being used to replace domestic legal analysis, including our constitutional jurisprudence. In the wake of *Lawrence v. Texas*, 539 U.S. 558 (2003) and *Grutter v. Bollinger*, 539 U.S. 306 (2003), it is important for this Court to demonstrate that domestic legal analysis may stand on its own foundation. Third, it reserves international law for the real role it plays in our national judicial system. *See, e.g., Olympic Airways v. Husain*, 540 U.S. 644, 658 (2004) (Scalia, J., dissenting) (recognizing this Court's practice of according the judgments of sister signatories to a treaty "great weight").[9]

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[9] **While some argue it is appropriate for this Court to consider the *Avena* decision in light of its interpretation of the actions of the government officials involved as *violations* of Article 36 of the Vienna Convention, this Court should refrain from reading into that decision a mandate to fashion some new *remedy*. Even the *Avena* decision itself makes clear that the remedy for the individual Mexican nationals is solely within the discretion of the United States judiciary. *See Avena*, ¶ 122.**

B. A bifurcated analysis approach is required under customary international law.

The exhaustion of municipal or local remedies is a long standing principle of customary international law. *See Interhandel* (Switz. v. U.S.), 1959 I.C.J. Rep. 5, 27 (Mar. 21) ("The rule that local remedies must be exhausted before international proceedings may be instituted is a well-established rule of customary international law."). The *Avena* decision found that the exhaustion of local remedies was not necessary for Mexico to bring a claim before the International Court of Justice. *See Avena*, at ¶ 40. However, this Court is adjudicating a claim of an individual. As such, the exception to the exhaustion of local remedies for states bringing the claims of their nationals as a claim of the state itself is not available in our federal courts.[10] Exhaustion of local remedies ensures that international law does not unnecessarily take over the domestic law of any state. As customary international law compels this Court to recognize the rule of exhaustion of local remedies as binding,[11] it is important for this Court to adopt a procedural rule that gives effect to that binding international requirement.

"Local remedies" included "the whole system of legal protection, as provided by municipal law," including "the use of procedural facilities which municipal law makes available to litigants." *Ambatielos Case* (Greece v. U.K.), 1951, 12 R.Int'l Arb. Awards 91, 120, 122. Thus, this Court should exhaustively analyze every domestic remedy available in any case before resorting to international sources to identify remedies. In the present case, there are purely municipal or domestic remedies already available. In addition, there are no international sources identifying specific individual remedies for Article 36 violations. Plainly, international law compels this Court to decide this case on purely domestic grounds already developed within the jurisprudence of this Nation.

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CONCLUSION

The exhaustion of local remedies is required under customary international law. Our domestic system of justice provides such an adequate local remedy – our procedural default rule and its exceptions including consideration of whether there has been a "miscarriage of justice." Each court below satisfied the *Avena* court's recommendation of "review and reconsideration" when they reviewed Petitioner's case. In fact, this Court went even further when it granted certiorari. No further remedy is required under any treaty, custom or the *Avena* decision. Replacing adequate domestic law with international law is unnecessary, unwise, and would actually violate customary international law.

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[10] The finding by the *Avena* court that such an exception to the general rule of exhaustion of local remedies applied is neither new nor novel. International law has consistently recognized the right of a State to bring a claim on behalf of its citizens as a claim of its own before international tribunals. *See, e.g., Barcelona Traction, Light and Power Co.* (Belgium v. Spain) 1970 I.C.J. 3.

[11] *See The Paquete Habana*, 175 U.S. 677, 700 (1900).

For the foregoing reasons, the Liberty Legal Institute respectfully requests the Court to affirm the opinion of the Court of Appeals.

Respectfully submitted,

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In The
Supreme Court of the United States

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JOSE ERNESTO MEDELLIN,

Petitioner,

v.

DOUG DRETKE,
Director, Texas Department of Criminal Justice,
Institutional Division,

Respondent.

◆

On Writ Of Certiorari To The
United States Court Of Appeals
For The Fifth Circuit

◆

AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

◆

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QUESTIONS PRESENTED

1. In a case brought by a Mexican national whose rights were adjudicated in the *Avena* Judgment, must a court in the United States apply as the rule of decision, notwithstanding any inconsistent United States precedent, the *Avena* holding that the United States courts must review and reconsider the national's conviction and sentence, without resort to procedural default doctrine?

2. In a case brought by a foreign national of a State party to the Vienna Convention, should a court in the United States give effect to the *LaGrand* and *Avena* Judgments as a matter of international judicial comity and in the interest of uniform treaty interpretation?

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AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

Mountain States Legal Foundation ("MSLF") respectfully submits this *amicus curiae* brief in support of the Respondent, Doug Dretke, Director, Texas Department of Criminal Justice, Institutional Division. Pursuant to Supreme Court Rule 37(2)(a), this *amicus curiae* brief is filed with the written consent of all the parties.[1]

◆

IDENTITY AND INTEREST OF *AMICUS CURIAE*

MSLF is a non-profit, membership public interest legal foundation dedicated to bringing before the courts those issues vital to the defense and preservation of individual liberties, the right to own and use property, limited and ethical government, and the free enterprise system. MSLF's members include businesses and individuals who live and work in nearly every state of the country.

MSLF members are engaged often in natural resources activities as well as other business enterprises that are highly regulated by federal and state laws, many of which include criminal sanctions. Moreover, MSLF has represented individuals who have been prosecuted or persecuted pursuant to these laws, which, all too often, are

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[1] Copies of the consent letters have been filed with the Clerk of the Court. In compliance with Supreme Court Rule 37(6), MSLF represents that no counsel for any party authored this brief in whole or in part and that no person or entity, other than MSLF, made a monetary contribution to the preparation or submission of this brief.

Draconian in their application and scope. *See*, *U.S. v. Unser*, 165 F.3d 755 (10th Cir. 1999), *cert. denied*, 528 U.S. 809 (1999); *Shook v. Montana*, 67 P.3d 863 (Mont. 2002), *cert. denied*, 540 U.S. 815 (2003). MSLF members and clients recognize that, under the U.S. Constitution, they are guaranteed certain rights and privileges; however, once they have exhausted their resorts to the courts of the land, including this Court, no other rights exist.

Medellin argues that, because he is a citizen of a foreign country, he has rights and privileges before the courts of this land, including this Court, which are unavailable to the citizens of this country. Moreover, Medellin claims that laws and court decisions in which the citizens of this country did not participate and in which their elected and appointed officials and judges played no part constrain and limit the citizens of this country in the actions that state and federal authorities may take regarding him for crimes he committed against this Nation's citizens. Such a bifurcated legal system, were it to be adopted by this Court, would undermine the confidence of MSLF members and clients as well as that of the Nation's citizenry regarding the legitimacy of the laws and court rulings to which they must be willing to be held accountable.

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SUMMARY OF THE ARGUMENT

Both the District Court and the Fifth Circuit found that Medellin waived his Vienna Convention claim when he did not raise that claim in state court. Both decisions should be upheld because they follow established American federal law in holding that Medellin's claim of a violation of his right to consular notification under the Vienna Convention was barred procedurally. For this Court to hold otherwise would be in direct conflict with its previously decided precedence.

◆

ARGUMENT IN SUPPORT OF PETITION

I. The District Court's And Fifth Circuit's Decisions That Medellin Waived His Vienna Convention Claim Should Be Upheld Because Those Decisions Follow Established Federal Law Barring Such Claims.

Both the District Court and the Fifth Circuit Court of Appeals held that Medellin was barred procedurally in federal court from raising a claim that he was denied consular assistance in violation of his rights under the Vienna Convention. *Medellin v. Cockrell*, No. H-01-4078 (S.D. Tex. filed June, 26, 2004); *Medellin v. Dretke*, 371 F.3d 270, 279-290 (5th Cir. 2004). The application of the procedural default rule to Medellin's claim is controlled by this Court's previous holdings and federal law.

A. The District Court's And Fifth Circuit's Decisions That Medellin Waived His Vienna Convention Claim Should Be Upheld Because Those Decisions Follow This Court's Previous Holdings.

In *Lee v. Kemna*, 534 U.S. 362, 375 (2002), this Court held that the Court "will not take up a question of federal law presented in a case 'if the decision of [the state court] rests on a state law ground that is independent and adequate to support the judgment.'" In the *habeas corpus* context, the application of this procedural default doctrine is grounded in concerns of comity and federalism. *Coleman v. Thompson*, 501 U.S. 722, 723 (1991).

Furthermore, in *Breard v. Greene*, 523 U.S. 371, 375-377 (1998), this Court concluded that Vienna Convention claims, like constitutional claims, may be defaulted procedurally, even in a death penalty case. In *Breard*, the Court declined to stay an execution of a Paraguayan national who was convicted in Virginia of murder and attempted rape. Like the current case, Virginia failed to notify the Paraguayan Consulate in violation of the Vienna Convention. Also, like the current case, the International Court of Justice issued a provisional order demanding that the United States "take all measures at its disposal" to stay the execution. *Paraguay v. the United States*, I.C.J. (decided April 9, 1998), *reprinted at* 37 I.L.M. 810, 819 (1998). This Court held that "while we should give respectful consideration to the interpretation of an international treaty . . . it is recognized in international law that, absent a clear and express statement to the contrary, the procedural rules of the forum State govern the implementation of the treaty in that State." *Breard*, 523 U.S. at 375; *see also*, *Sun Oil Co. v. Wortman*, 486 U.S. 717, 723 (1988); *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 700 (1988). This Court further ruled that the holding of the International Court of Justice was not binding and, even if it were, that the federal government did not have the authority to impose it upon the states because federal authority over the States' criminal justice system is limited. *Breard*, 523 U.S. at 373.

Thus, the Fifth Circuit held that it may not disregard this Court's clear holding that ordinary procedural default rules may bar Vienna Convention claims:

> If a precedent of the Supreme Court has direct application in a case, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.

Medellin, 371 F.3d at 280 (quoting *Rodriguez de Quijas v. Shearson/American Express*, 490 U.S. 477, 484 (1989)).

B. The District Court's And Fifth Circuit's Decisions That Medellin Waived His Vienna Convention Claim Should Be Upheld Because Those Decisions Follow The 1996 Antiterrorism And Effective Death Penalty Act.

Any enforceable rights that Medellin might have been entitled to under the Vienna Convention are limited by the 1996 Antiterrorism and Effective Death Penalty Act, 28 U.S.C. § 2254(a)(e)(2). This Act provides that federal courts should not hold evidentiary hearings on *habeas* claims, including claims based on alleged treaty violations, "[i]f the applicant has failed to develop the factual basis of [the] claim in State court proceedings." *Id.*

Medellin's ability to obtain relief based upon violations of the Vienna Convention is subject to this Act, just as any claim arising under the United States Constitution would be. This Act prevents Medellin from establishing that the violation of his Vienna Convention rights caused prejudice because Medellin failed to raise this claim in state court and thereby failed to "develop the factual basis" of his claim in that court. As a result, Medellin is barred procedurally from now raising this claim.

II. The District Court's And Fifth Circuit's Decisions That Medellin Waived His Vienna Convention Claim Should Be Upheld Because The Decisions Of Other Countries Do Not Supersede The Law Of This Country.

Contrary to the Supreme Court's decision in *Breard*, the International Court of Justice held that procedural default doctrines do not bar Vienna Convention claims. *See, Germany v. United States of America ("LaGrand")*, 2001 I.C.J. 104 (Judgment of June 27); *Mexico v. United States of America ("Avena Judgment")*, 2004 I.C.J. 128 (Judgment of March 31). Medellin argues that the *LaGrand* and *Avena* Judgments should apply to his case.

There are numerous reasons why Medellin's argument should be rejected. First, this Nation follows a "dualist" approach to international law. Bradley, Curtis, *Breard, Our Dualist Constitution, and the International Conception*, 51 Stan. L. Rev. 529 (February 1999). Under this dualist view, international and domestic laws are distinct and each nation determines for itself when and to what extent international law is incorporated into its legal system. The status of international law in the domestic system is determined by domestic law, and under dualism a nation's courts look inward to domestic standards and processes. *Id.* Relevant domestic standards pertaining to the issue in Medellin's case have been created by this Court and it is these American standards that apply to this case, not the standards of the international courts. It is this Nation's domestic policy that Vienna Convention claims are barred procedurally in state cases when, as here, the claim was not raised in state court. Therefore, Medellin's claim should be denied because it is inconsistent with the domestic policy of the United States.

Second, foreign decisions are based on an entire set of cultural, political, and societal norms that are separate from those in the United States. These foreign norms may or may not be similar to the norms in this country. There are significant dangers in giving authority over this Nation's courts to a body that does not represent the interests of the United States. These dangers include: strengthening of the precedential value of foreign authorities where there has been no distinction regarding which foreign authorities should and should not be binding; encouraging international actors who do not have the best interests of the United States; system at heart; and reducing the United States' freedom of action regarding civil and criminal matters in the future. Eric D. Hargan, *The Sovereignty Implications of Two Recent Supreme Court Decisions*, http://www.fed-soc.org/IntlLaw&AmericanSov.htm (posted July 11, 2004).

Third, the use of foreign law in the United States will result in the creation of an international legal regime that does not answer to American voters and is not based upon our republican form of government or the Constitution's system of checks and balances. A significant body of American jurisprudence could be struck down if it were subject to foreign precedent. For example, the United States is "out of step" with the views of international tribunals because the United States is not a signatory to: the Kyoto Protocol (signed by more than 85 nations), the Rome Statute of the International Criminal Court (signed by 97 nations), the Convention on the Rights of the Child (not ratified by only two nations, the United States and Somalia), and the Mine Ban Treaty Act (signed by more than two-thirds of the nations of the world). These examples are illustrative of the numerous instances in which the United States' view of international law is inconsistent with the view of the majority of other nations. Adopting foreign law would create many inconsistencies between American values and beliefs and the laws governing this Nation's residents.

Furthermore, requiring the States to transfer their authority over domestic actions to the International Court of Justice violates the U.S. Constitution's Dual Sovereignty and the rights reserved to the States under the Tenth Amendment. *U.S. v. Lopez*, 514 U.S. 549, 561 (1995). Moreover, such a transfer would undermine the state courts' efficiency and the timely presentation of claims, causing harm to an already overburdened system. It is in the interest of fairness and justice, including speedy trials and final resolution of criminal cases, that exclusive domestic authority over domestic criminal activities be retained.

This Court should reject this attempt to subordinate this Nation's Constitution, its well-established judicial principles, and various Acts of Congress. This Court should deny Medellin's Vienna Convention claims.

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CONCLUSION

For the foregoing reasons, Mountain States Legal Foundation respectfully requests that this Court uphold the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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CORRECTIONAL INSTITUTIONS DIVISION,

Respondent.

On Writ of Certiorari
to the United States Court Of Appeals
for the Fifth Circuit

BRIEF *AMICUS CURIAE* OF NAFSA: ASSOCIATION OF INTERNATIONAL EDUCATORS AND U.S. CATHOLIC MISSION ASSOCIATION, *ET AL.*, IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amici are organizations that send U.S. citizens abroad for the purpose of either engaging in study or providing missionary and relief work, groups that provide support for the work of study-abroad and missionary organizations, and U.S. citizens who have served as missionaries abroad.

Amici express no opinion in this brief on the validity of imposing a death sentence on Mr. Medellin, or on the propriety of the death penalty in general. It is their shared view, however, that government officials must give full force to the Vienna Convention's promise of access to consular assistance, and that the lower court's refusal to provide meaningful review of the treaty violation in this case will undermine the promise of access to consular assistance, on which missionaries and students rely when traveling overseas for study, volunteer work, and humanitarian projects.

Missionary Service Organizations

The **United States Catholic Mission Association** has served Catholic mission sending groups for over twenty years. The Association promotes and supports missionary activity beyond the boundaries of the United States and assists member groups to understand better the essential and integral role of work for justice in all missionary activity.

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[1] Pursuant to Rule 37.6, *amici* certify that no counsel for a party authored this brief in whole or in part. No person or entity other than the *amici curiae* and their counsel made any monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.3(a), the parties have consented to the filing of this brief of *amici curiae* and their letters of consent are on file with the Court.

The **Maryknoll Society** of priests and brothers was established in 1911 as the Catholic Foreign Mission Society of America by the Bishops of the United States. Maryknoll's first missioners left for China in 1918. Today there are over 550 Maryknoll priests and brothers serving in countries around the world, principally in Africa, Asia, and Latin America.

The **Franciscan Mission Service** supports lay people from the United States in overseas mission. Since 1990, approximately 200 missioners have been trained and sent overseas to serve Franciscan communities in Bolivia, Brazil, Guatemala, Honduras, Jamaica, Kenya, Namibia, Peru, Philippines, Siberia, Thailand, Zambia, and Zimbabwe. Lay Missioners live with the poor and work in clinics, hospitals, schools, parishes, and farmlands. Upon completion of their overseas assignment, Lay Missioners share their stories and seek ways to utilize their experiences in the United States, thereby promoting justice and peace throughout the world.

The **Conference of Christian Brothers** serves the United States/Toronto Region of the Brothers of the Christian Schools, the largest order of religious Brothers in the Roman Catholic Church, who are dedicated exclusively to education, particularly of the poor and disadvantaged. The Christian Brothers in the United States/Toronto Region serve in 30 states in the United States, in Toronto, and in the international missions of Africa, Asia, Latin America, and the University of Bethlehem in the Mideast. They are assisted by more than 5,000 partners in 121 institutions where they work with nearly 80,000 students. The Conference of Christian Brothers provides programs and services to all those involved in the mission of the Christian Brothers.

Jesuit Volunteers International (JVI) is a lay Roman Catholic organization. Its mission is to form leaders of tomorrow as it works for the Kingdom of God today. JVI provides volunteers to work as educators, pastoral care givers and social workers as they live in community, grow in faith, seek justice and live simply with people and communities in developing nations. Working alongside Jesuits, volunteers live a call that is rooted in the Gospel and articulated in contemporary Jesuit Theology of mission. Volunteers serve in Latin America, Asia and the Pacific, and Africa. Volunteers do not proselytize.

Medical Mission Sisters, Alliance for Justice Office is the Medical Mission Sisters' information center for global justice actions and advocacy. The Medical Mission Sisters are an international community of Catholic Sisters, including U.S. citizens, who serve in 19 countries on five continents, among people made poor, among those who have limited or no access to health care, and among those unjustly treated or oppressed.

The **Marianist Province of the United States** is a part of the Society of Mary (Marianists), an international Catholic religious order of brothers and priests. The U.S. Province has more than 600 members serving in the United States, East Africa, India, Bangladesh, Mexico, and South Korea. They work in universities, primary and secondary schools, parishes, retreat centers and in numerous areas such as social justice, spiritual formation, art, and the environment. The Province also has volunteers who serve for a year or more in some of these same areas.

Maryknoll Office of Global Concerns represents Maryknoll priests, brothers, sisters, and lay missioners in their work for justice and peace in more than thirty countries in Latin America, Asia and the Pacific, Africa, and the

Middle East. The Office provides education and advocacy in consultation with Maryknollers around the world, and brings the voice of Maryknoll into policy discussions in the United Nations, the United States and other governments, international financial institutions, and the corporate world.

The **Franciscan Friars of Holy Name Province** are the largest province of Franciscan priests and brothers in the United States, with over 400 men serving the poor in the eastern United States and abroad, with missions in three continents. Rooted in the Catholic and Franciscan tradition, the Friars foster Christian discipleship by collaborating with those whom they serve and by standing in solidarity with all people, especially the alienated, the immigrant, and the poor.

Holy Cross Associates is a post-graduate service program which offers participants an opportunity to integrate their Christian faith though service, community living, prayer, and simple living. Sponsored by the Congregation of the Holy Cross since 1978, Holy Cross Associates sends participants for both one-year domestic and two-year international placements in Chile.

Los Embajadores is an experiential service-learning program for high school and college age youth participants. Since 1988, Los Embajadores participants have been making eleven-day service trips to one of three sites in Northern Mexico to work with and live among local communities. Participants build relationships with the Mexican people and gain a firmer understanding of the social justice issues that underlie poverty.

Mission Project Service (MPS) helps Church people in less-industrialized countries obtain assistance from international agencies for their religious and socio-economic projects. At the request of dioceses, religious communities

and others, MPS staff travels to give two or three-day workshops on seeking assistance from international aid organizations. During the past five years alone, they shared their expertise with Church groups in the Dominican Republic, Australia, Papua New Guinea, Fiji, Colombia, Peru, and the United States.

Medicines for Humanity is dedicated to saving children's lives in impoverished communities worldwide. Medicines for Humanity partners with religious groups who are serving in impoverished areas and helps local healthcare personnel to implement effective health initiatives for children.

The Office of the Missions, Roman Catholic Diocese of San Diego, provides direct support for Catholic missionary activity in a number of ways. The Office organizes trips to foreign missions for Catholic laypeople and clergy. It also provides financial aid for the work of missionary priests, sisters and lay missioners as well as dioceses in mission lands, and works to raise awareness about the worldwide mission activities of the Catholic Church.

Study-Abroad Organizations

Boston University's Division of International Programs is committed to helping students develop the knowledge, skills, and understanding that prepare them for life and work in today's global society. The Division offers a broad range of international study, internship, and fieldwork opportunities to qualified students from Boston University and other colleges and universities alike as an integral part of their education. Currently, Boston University's Division of International Programs offers 45 academic programs abroad that successfully combine students' intellectual and social development with practical experience in life and work. Program locations include Auckland, Beijing, Belize, Burgos, Dresden, Dublin, Haifa, Geneva, Grenoble, Kyoto, London, Madrid, Menorca, Niger, Oxford, Padova, Paris, Peru, Quito, Sydney, Turkey, and Venice.

Santa Clara University School of Law and its Institute of International and Comparative Law has, since 1974, provided unique opportunities for law students and lawyers to study various aspects of international and comparative law around the globe. Each site was selected to provide students with a special emphasis on a particular international law issue, including free trade, hi-technology, and international human rights. Most programs provide internships with law offices, corporations, or groups to afford students an opportunity to participate directly in the legal affairs of the country while learning valuable lessons in legal culture and practice. Summer study abroad programs take place in Munich, Germany; Strasbourg, France; Geneva, Switzerland; Oxford, England; Tokyo, Japan; Hong Kong, Beijing, Shanghai, China; Kuala Lumpur, Malaysia; Ho Chi Minh City, Viet Nam; Singapore; Bangkok, Thailand; Sydney, Australia; Seoul, Korea; and beginning in summer 2005, Phnom Penh, Cambodia.

Syracuse University, Division of International Programs Abroad encourages Syracuse students to study abroad to experience diverse cultures and ideas. The Division of International Programs maintains academic centers in England, France, Hong Kong, Italy, Spain, and Zimbabwe. Each center has close ties to local universities, allowing students to design integrated programs of study appropriate to their academic and language abilities. In addition, the Division of International Programs Abroad has links to study abroad programs offered through other colleges and universities, giving students the opportunity to study in other countries around the world.

Fordham University's Office of International and Study Abroad Programs sponsors worldwide study abroad programs for qualifying students. Its roster includes highly competitive academic-year and semester programs in the English-speaking world, Europe, Africa, the Far East, Oceania, the Middle East, and Latin America. These opportunities for study abroad help students prepare for the challenges of international citizenship by enabling them to gain an understanding of other cultures and languages and to incorporate a global dimension in their chosen field of study.

NAFSA: Association of International Educators is an association of individuals worldwide advancing international education and exchange. NAFSA has nearly 9,000 members at 3,500 institutions worldwide, representing 84 countries. Members of NAFSA share a belief that international educational exchange advances learning and scholarship, builds respect among different peoples, and encourages constructive leadership in a global community. NAFSA serves its members, their institutions and organizations, and others engaged in international education and exchange and global workforce development by setting and upholding standards of good practice; providing training, professional development, and networking opportunities; and advocating for international education.

The Council on Standards for International Educational Travel (CSIET) is a private, not-for-profit organization whose mission is to identify reputable international youth exchange programs, to provide leadership and support to the exchange and educational communities so that youth are provided with meaningful and safe international exchange experiences, and to promote the importance and educational value of international youth exchange.

LASPAU: Academic and Professional Programs for the Americas, Inc. is a nonprofit organization affiliated with Harvard University that designs, develops, and implements academic and professional exchange programs on behalf of individuals and institutions in the United States, Canada, Latin America, and the Caribbean. LASPAU designs and administers degree-granting international exchange programs, professional development workshops, symposia, and related activities that address the social, technological, economic, and environmental challenges facing the Americas. Since 1964, LASPAU has administered graduate degree academic programs of over 16,000 exchange students in U.S., Canadian, European, Latin American, and Caribbean universities and regularly assists and advises U.S. students studying in Latin America.

The Institute of Current World Affairs awards Fellowships for overseas study to young women and men under 36 years of age in order to provide them with an opportunity to develop a deep understanding of an issue, country, or region outside the United States and to share that understanding with a wider public. The Institute purposefully awards its fellowships to young people, so that they may contribute what they learn through their international experience for years to come.

Youth For Understanding USA (YFU) is a non-profit educational organization partnered with a worldwide network of interdependent, yet autonomous YFU organizations in more than 50 countries, exchanging more than 4000 students annually. YFU and its organizations are committed to preparing young people for their responsibilities and opportunities in a changing,

interdependent world. As a full immersion exchange program, the primary cross-cultural activity is daily living with a host family. Membership in a family, a family's community, and a local school concurrently provide an invaluable opportunity for self-learning about U.S. and other cultures. YFU USA administers competitive scholarship programs for U.S. high school students sponsored by the Finnish and Japanese governments, and also administers a sizable corporate scholarship program.

Break Away, Alternative Break Connection places teams of college or high school students in communities to engage in community service and experiential learning during their summer, fall, winter, or spring breaks. Students perform short term projects for community agencies and learn about issues such as literacy, poverty, racism, hunger, homelessness, and the environment. Break Away currently has a network of over 120 chapter schools, more than 450 nonprofit partners, and hundreds of individual members worldwide. About 139 colleges and universities in the United States are members of Break Away.

American Intercultural Student Exchange (AISE) serves over 4,000 students and host families, through various exchange programs. AISE student exchange programs are based on the belief that international student exchanges contribute to respect for other people and cultures, foster human understanding, and permit students to experience global community. AISE provides opportunities for foreign students ages 15-18 to live with host families in the U.S. and provides the same opportunities for U.S. students seeking an experience abroad. AISE has representatives in Sweden, Norway, Denmark, Finland, United Kingdom, Germany, Austria, Netherlands, Switzerland, France, Italy, Spain, Hungary, Slovakia, Argentina, Brazil, Colombia, Ecuador, Peru, Australia, New Zealand, Thailand, China, Korea, Vietnam, Japan, Mongolia, Kazakhstan, and Serbia.

Former Missionaries

Fr. Francis T. McGourn, M.M. is the Vicar General of the Maryknoll Fathers & Brothers. He has served and taught in Peru and Bolivia. He also has served as the director of the Maryknoll Center for Mission Studies.

Fr. John C. Sivalon, M.M. is the Superior General of the Maryknoll Fathers & Brothers. Father Sivalon ministered to the people of Tanzania, East Africa for 26 years (1975-01), until his election as Superior General.

William R. Burrows, Ph.D. served as a Catholic missionary in Papua New Guinea. He is now the managing editor of Orbis Books in Maryknoll, New York.

Charlotte Cook served as a Maryknoll Catholic Lay Missioner in Kenya from September 1993 to December 2002. She is now the Associate Director of the U.S. Catholic Mission Association, doing education-related work with a focus on Africa and Latin America.

Noel Dunne and Marianne Dunne served as missionaries in Peru from 1977-1986.

Sr. Janet Korn, RSM works in Mission Education for the Diocese of Rochester. She served in Chile for 16 years.

Alice P. Rieckelman, M.D. is a psychiatrist and a Maryknoll Sister. She has worked for many years in Asia, Africa, and Latin America. Much of her professional practice has focused on helping missionaries who have suffered violence, typically in foreign countries.

Fr. Adolph Menendez is a Xaverian priest. He has served in Japan and Mexico.

SUMMARY OF ARGUMENT

Thousands of students and missionaries travel overseas each year. These U.S. citizens not only improve their own skills for living and working in a globally interdependent world, they also serve vital U.S. interests. They bring a better understanding of diverse cultures to the United States and engage in a variety of crucial humanitarian efforts around the world.

The United States repeatedly instructs its officials and its citizens on the importance of consular assistance to citizens traveling overseas, a right guaranteed in Article 36 of the Vienna Convention on Consular Relations (VCCR). In turn, the *amici* inform their participants about the availability and importance of consular assistance in the event of an emergency. For U.S. citizens who study and serve abroad, the promise of consular assistance must not be an empty one. However, the ability of the United States and its citizens to enforce the VCCR depends on the extent to which the VCCR rights of foreign nationals are protected in the United States. The willingness of other nations to facilitate Americans' access to U.S. consular officials will be determined by the extent to which federal, state, and local government officials in the U.S. ensure that foreign nationals have access to their own consular officials. Indeed, the U.S. Department of State recognizes that adherence to the VCCR "will ensure that the U.S. can insist upon rigorous compliance by foreign governments with respect to U.S. citizens abroad."[2]

The failure by the lower court to provide meaningful review and reconsideration to the denial of Mr. Medellin's right to contact the Mexican consulate is contrary to our government's obligations under the VCCR and, if it is upheld, could lead to grave consequences for our citizens abroad. Because U.S. citizens are likely to receive the same treatment as we provide foreign nationals in the United States, a refusal by the United States to give full force to the right to consular assistance will provide other countries with a basis for denying the same right to our citizens abroad.

ARGUMENT

1. Reciprocal Compliance with the Vienna Convention on Consular Relations Assures U.S. Consular Access Worldwide

The thousands of Americans who leave their homeland each year for extended study or service abroad do so with the assurance that their State Department "has no more vital responsibility than the protection of American citizens."[3] Without question, the global assistance that the United States extends to its expatriate citizens "from the cradle to the grave"[4] is largely dependent on universal compliance with the rights and privileges conferred under the Vienna Convention on Consular Relations (VCCR).[5]

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[2] U.S. Department of State, *Consular Notification and Access, at* http://travel.state.gov/law/consular/consular_753.html.

[3] U.S. Department of State, Bureau of Resource Management, *FY 2004 Performance and Accountability Report* 163 (2004).

[4] *Id.*

[5] Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261.

Indeed, the adoption of the VCCR in 1963 has been aptly described as "undoubtedly the most important event in the entire history of the consular institution."[6]

Article 36 of the VCCR enshrines and codifies the time-honored consular task of rendering assistance to foreign nationals who are under any form of detention while abroad. As the United States Government emphasized before the International Court of Justice, Article 36 "establishes rights not only for the consular officer but, perhaps more importantly, for the nationals of the sending State who are assured access to consular officers and through them to others."[7] Paragraph (1)(a) of the Article guarantees that U.S. citizens abroad are free to communicate with and have access to their consular representatives. By obliging local authorities to advise all detained American nationals of their right to consular contact without delay, paragraph (1)(b) ensures that U.S. consular officers can protect the rights of their fellow citizens in the most timely and effective manner possible. Article 36(1)(c) confers the right on U.S. consular officials to visit, converse, and correspond with American detainees and to arrange for their legal representation. Finally, Article 36(2) categorically requires that local laws and regulations "must enable full effect to be given to the purposes for which the rights accorded under this Article are intended."

The State Department has instructed its diplomatic and consular personnel that:

> In order for the consular officer to perform the protective function in an efficient and

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[6] Luke T. Lee, *Consular Law and Practice* 27 (2d ed. 1991).

[7] Memorial of the United States, *United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)*, I.C.J. 1980 Pleadings 174 (Jan. 15).

> timely manner, it is essential that the consul obtain prompt notification whenever a U.S. citizen is arrested. Prompt notification is necessary to assure early access to the arrestee. Early access in turn is essential, among other things, to receive any allegations of abuse, to provide a list of lawyers and a legal system fact sheet to prisoners, to obtain a Privacy Act waiver, and to acquire certain information to enable the post and the Department to respond promptly and accurately to inquiries about the case.[8]

So important is this obligatory mechanism to the performance of essential consular functions that "protesting unreasonable delays in consular notification is not discretionary but has long been an integral element of U.S. policy to provide protective consular services to detained Americans overseas."[9]

In the 35 years since its ratification, the United States has relied consistently on the terms of the VCCR and its judicial enforcement mechanism to safeguard the consular rights of its citizens in other countries. The reciprocal nature of those rights and obligations has been emphasized by U.S. officials on every such occasion. As then-Secretary of State Albright declared in 1998,

> we are part of an international system in which it is important to respect the various rules and conventions and laws that have been created to make that system work....[T]he reason that there are rules, and we have been the creators of many of them, is because we benefit from them....[W]e respect the International Court of Justice as a part of the system that I described and because it is very important from a perspective of Secretary of State to assure ourselves that our citizens, were they to find themselves in any trouble whatsoever abroad, that they also would be afforded their rights.[10]

Few other multilateral treaties impact so directly on the well-being and safety of American citizens abroad, and none are more dependent on mutual compliance for their continued viability. In the words of American jurist Stephen Schwebel, the former President of the International Court of Justice (I.C.J.), "[t]he mutuality of interest of States in the effective observance of the Vienna Convention on Consular Relations is greater in the intermixed global community of today and tomorrow (and the citizens of no State have a higher interest in the observance of those obligations than the peripatetic citizens of the United States)."[11]

2. The United States Recognizes the Binding Force of the Treaty and of Its International Enforcement Mechanism

The domestic legal stature that the United States has conferred on the VCCR is of the highest order. When the

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[8] U.S. Department of State, Foreign Affairs Manual, *Notification*, 7 FAM 411 (1984).

[9] Telegram from U.S. Department of State to all U.S. diplomatic and consular posts abroad, *at* http://www.state.gov/s/l/16139.htm (Jan. 1, 2001) (concerning consular assistance for American nationals abroad).

[10] Madeleine Albright, Secretary of State, Remarks at Howard University, USIS Washington File, *at* http://usembassy-australia.state.gov/hyper/WF980415/epf302.htm (Apr. 14, 1998).

[11] Declaration of President Schwebel, Order of April 9, *Vienna Convention on Consular Relations (Paraguay v. U.S.)*, 1998 I.C.J. Reports.

Senate gave its unqualified consent to ratification of the VCCR in 1969, it did so in the knowledge that the Executive branch considered the treaty to be "entirely self-executive" and one which "does not require any implementing or complementing legislation."[12] The VCCR thus falls within the select body of U.S. treaties that achieve full domestic legal effect immediately upon ratification and the terms of which may confer a private cause of action in the United States courts.[13]

The Senate was also informed by the Executive that "[t]o the extent that there are conflicts in Federal legislation or State laws, the Vienna Convention, after ratification, would govern" as the supreme law of the land.[14]

Moreover, the Senate simultaneously consented to ratification of the VCCR Optional Protocol Concerning the Compulsory Settlement of Disputes, the binding international enforcement mechanism for the treaty proper.[15] Article 1 of the Optional Protocol declares that disputes arising out of the interpretation or application of the VCCR "shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol."[16]

The clear meaning of this provision and the reciprocal nature of its terms could not have been lost on either the executive or the legislative branches. In any event, it is a general principle of construction long observed by this Court that treaties "shall be liberally construed, so as to carry out the apparent intention of the parties to secure equality and reciprocity between them."[17] Where a treaty invests a body with the authority to adjudicate claims arising under its terms, the decision of that body is "conclusive and final….The parties must abide by it as the decree of a competent tribunal of exclusive jurisdiction."[18]

3. To Ensure the Safety of Our Students and Missionaries Abroad, the United States Must Comply with the Vienna Convention on Consular Relations

Thousands of students, at the high school, college, and graduate level travel overseas for volunteer and work experience each year. In higher education alone, 174,629 students received credit for study abroad in the 2002-2003 academic year, a number that increased by 8.5% from the previous year.[19] One of the fundamental responsibilities of American embassies and consulates is to serve these

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[12] J. Edward Lyerly, Deputy Legal Adviser for Administration, U.S. Department of State, *Statement Before the Senate Committee on Foreign Relations*, S. Exec. Rep. No. 91-9, 91st Cong. at 5 (May 8, 1969).

[13] *Foster & Elmar v. Neilson*, 27 U.S. 253, 314 (1829); *Head Money Cases*, 112 U.S. 580, 598-99 (1884).

[14] *Id.* at 24. *See also Hines v. Davidowitz*, 312 U.S. 52, 62-63 (1941) (holding that, under the Supremacy Clause of the U.S. Constitution, no state can add to or take from the force and effect of a ratified U.S. treaty establishing the rights of aliens).

[15] Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, *opened for signature* Apr. 24, 1963; *entered into force* March 19, 1967; *for the United States*, Dec. 24, 1969, 21 U.S.T. 325, 596 U.N.T.S. 487.

[16] Optional Protocol, *supra*, at 15.

[17] *DeGeoffrey v. Riggs*, 133 U.S. 258, 271 (1890).

[18] *Comegys v. Vasse*, 26 U.S. (1 Pet.) 193, 212 (1828).

[19] Open Door, *Study Abroad Surging Among American Students*, *at* http://www.opendoors.iienetwork.org (Nov. 15, 2004).

American citizens abroad in various emergencies and times of need.[20]

This assistance is especially critical when U.S. citizens become entangled in foreign criminal justice systems. The vast majority of Americans who study or serve abroad do so without any mishaps or misconduct. However, the State Department estimates that over 2,500 Americans are arrested in foreign countries every year.[21] The causes of these arrests range from serious criminal activity, to foolhardy behavior, to accidental mishaps such as car accidents, to the innocent taking of photographs. More than half of these arrests are made on illegal drug charges, including possession of very small quantities of narcotics like marijuana and cocaine.[22] Ignorance of foreign laws also accounts for a significant number of arrests.[23] In some countries, the risk of being detained at the scene of a car accident is high; drivers and passengers alike can "wind up in a hellhole of a prison cell."[24] According to the State Department, Americans abroad may find themselves ill or in prison "because they didn't understand the legal system or they came crosswise with the system."[25] Even the most well-meaning student or volunteer can face serious legal consequences through a misunderstanding of foreign laws and customs.

Foreign exchange programs and fellowships rely on the availability of consular assistance as basic protection for their participants. Indeed, they are careful to refer students to the State Department website and to inform students of the protections that the U.S. consulate can provide in a variety of emergencies.[26] Although participants are aware that there are limits to the actions that consular officials can take, they also understand the value of the assistance that the consulate can provide. The ability of consular officials to insist on proper treatment, notify the citizen's family, bring food, medication, and reading material, provide information on legal rights and local attorneys, and protest improper confinement conditions provides those who volunteer to study or work abroad with a basic level of security.[27]

These most basic protections are imperiled if the United States cannot insist that foreign governments conscientiously and rigorously comply with the right to consular assistance. Access to consular assistance is required during all stages of possible involvement with a foreign criminal justice system. Consular assistance ranges from diplomatic efforts to assist detained Americans to actual involvement in the trial process. The entire range of available assistance is at risk if federal, state, and local government officials in the United States do not treat foreign citizens in the same way that we hope American citizens will be treated abroad.[28]

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[20] R. Nicholas Burns, Spokesperson, U.S. Department of State, Press Statement, *at* http://www.hri.org/docs/statedep/1995/95-09-29.std.html (Sept. 29, 1995).

[21] U.S. Department of State, *International Travel Safety Information for Students*, *at* http://travel.state.gov/travel/living/spring/spring_1239.html. *See also* David Koeppel, *In Some Countries Dangerous Legal Pitfalls Await the Unwary Visitor*, N.Y. Times, Jan. 28, 2003 ("The State Department estimates that about 3,000 Americans are arrested in foreign countries every year, and most experts say the true figure is probably higher. In many cases, guilt or innocence is irrelevant."), *available at* http://travel2nytimes.com/mem/travel/article-page.html?res=9502E4d61239F93BA15752C0A9659C8B63.

[22] Michael A. De Yoanna, *U-Colorado: Student Travelers Cautioned*, Univ. Wire, Mar. 18, 2002.

[23] Ananta Medury, *U. Arkansas: Powell Advises Student Travelers to be Cautious During Spring Break*, Ark. Traveler, Feb. 26, 2003.

[24] Koeppel, *supra* (quoting Richard Atkins, Vice President of International Recoveries, a Philadelphia organization that works with Americans arrested abroad).

[25] R. Nicholas Burns, Press Statement, *supra*, at 17.

[26] *See, e.g.*, http://www.ciee.org; http://www.studiesabroad.com/resources/document/stateDepartment; http://www.iesabroad.org/parents/Resources/do.

[27] Koeppel, *supra*, at 18.

A wide variety of circumstances may give rise to the need for U.S. consular assistance. For instance, naïve teenagers are sometimes enticed abroad to commit drug offenses without comprehending the serious consequences that await them. In 1996, two American students were arrested in Lima, Peru after they were offered $5,000 and an all expense paid trip in exchange for carrying suitcases containing cocaine across the border. Professor Ralph Ruebner of the John Marshall Law School, one of the lawyers who eventually secured their release after three years imprisonment, told the Congressional Human Rights Caucus that their confinement conditions were "absolutely shocking," with no running water, minimal health care and rampant disease.[29] While most students are sufficiently savvy and responsible to avoid such difficulties, the availability of consular assistance assures that vulnerable young people who become entangled in a foreign legal system receive fundamental assistance, including the basic necessities of life.

Even entirely innocent behavior might cause trouble for a student or missionary abroad. In Venezuela, an American man was arrested after his car was rear-ended by another driver, who sustained serious injuries.[30] In 1977 in El Salvador, American missionaries were detained for taking a photograph of a police station, which was deemed a "national security installation," during a "state of siege."

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[28] U.S. Department of State, *Consular Notification and Access*, Part II, *at* http://travel.state.gov/law/consular/consular_747.html.

[29] Phil Helsel, *State Dept: Students Must Be Wary of Travel Dangers* (Apr. 6, 2001), *at* http://www.thelantern.com.

[30] Koeppel, *supra*, at 18.

The State Department vigorously objected that the citizens were not immediately informed of their right to consular notification. Four hours after the U.S. Consulate was officially notified, the missionaries were released.[31]

For Americans who serve in places with hostile regimes, performing even relief and missionary work can be perilous. In August 2001, two American relief workers in Afghanistan, Heather Mercer and Dayna Curry, were arrested by the Taliban and charged with the capital offense of preaching Christianity. The State Department repeatedly insisted on consular access -- despite the fact that the U.S. did not recognize the Taliban as a legitimate government -- stating that "it is an accepted and appropriate practice for states such as the United States to request, and for those holding detained people, to permit consular visits."[32] Mercer and Curry's trial was suspended after the September 11 attacks, and they were released after the Taliban fled Kabul in November 2001.[33]

Although consular assistance is never intended to trump the legal system in a foreign country, it can ensure that students and missionaries receive humane treatment and crucial legal support. The experiences of Josie Beecher, an Episcopal Church worker in El Salvador, and John Tobin, a Fulbright scholar in Russia, highlight the importance of timely and ongoing consular involvement.

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[31] U.S. Department of State, *Digest of United States Practices in International Law* 290 (1977).

[32] Phillip T. Reeker, Deputy Spokesperson, U.S. Department of State, Press Statement, *at* http:// www.state.gov/r/pa/prs/dpb/2001/4546.htm (Aug. 14, 2001).

[33] CNN, *Afghan prison ordeal ends happily for U.S. aid workers*, *at* http://www.cnn.com/CNN/Programs/people/shows/curry.mercer/profile.html.

Beecher, an American citizen working at a church in San Salvador in 1989, was arrested after guerillas launched a bomb attack from the church grounds. Ms. Beecher's church colleagues reported her arrest to the State Department, which in turn notified the American embassy.[34] A consular officer immediately went to the police, negotiated Beecher's release throughout the day while the police headquarters were under gunfire, and escorted her safely to her hotel. Other local members of the same church group were detained for more than a month and were allegedly beaten while in custody.[35]

Tobin was conducting political research at a university in Voronezh. Arrested in January 2001 for marijuana possession, he was later briefly accused of being a drug trafficker and a spy. There were widespread allegations that the charges against him were fabricated by the Russian security services. Throughout his incarceration, consular officials maintained contact with Tobin as well as his attorney and his family, monitored his treatment, and attended court hearings. He was released six months into his sentence, following high-level pressure applied by the U.S. government.[36]

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[34] *See* Letter from U.S. Department of State, Central American Affairs Bureau, *at* http://www.foia.state.gov/documents/elsalvad/5e0a.PDF (Mar. 29, 1990) (Salvadoran National Guard also notified the American embassy).

[35] *Id.*

[36] "Tobin's family has said he was framed on the drug possession charges because he wouldn't work as a spy for the Russian government. Russian authorities accused Tobin of training to be a spy, although they never charged him with espionage." CNN, *Freed U.S. Student Home From Russia*, http://www.cnn.com/2001/WORLD/europe/08/08/russia.tobin/index.html (Aug. 8, 2001). Discussing the Tobin case, a State Department representative indicated in a press briefing that "we have been working with him throughout, from the very first days of his incarceration, and have been working with his family, and we continue to work with him and keep in touch with Russian authorities." U.S.

The experience of Elizabeth Coleman-Gray, an American attorney who traveled to Peru to represent two American citizens, demonstrates that access to timely consular intervention can sometimes be a matter of life or death. After being taken into custody, she was assaulted and raped. Alerted by other police officers, consular officials from the U.S. Embassy in Lima came to her assistance and secured her release. She believes that if Peruvian officials had not contacted the embassy, she "would not be alive today."[37]

Thus, U.S. citizens who pursue studies or perform humanitarian work overseas will occasionally encounter unfamiliar and potentially hostile legal systems. Organizations that send them or sponsor their work must be able to assure participants that the U.S. consulate can intervene not only to help them navigate unfamiliar legal procedures, but also to ensure their well-being and safety.

Department of State Daily Press Briefing, *at* http://www.usembassy-israel.org.il/publish/peace/archives/2001/august/0803c.html (Aug. 2, 2001). In another briefing describing a visit paid to Tobin by his father and Representative Maloney, the State Department explained that "Secretary Powell did raise this case with Foreign Minister Ivanov at their meeting in Washington a few weeks ago. He raised it again at the meeting they had in Budapest yesterday. So helping the family and looking after the welfare of Mr. Tobin and seeing what can be done remain important to us, and we will continue to work on those things." U.S. State Department Briefing, *at* http://www.state.gov/r/pa/prs/dpb/2001/3188.htm (May 31, 2001); Valdimir Isachenkov, *Detained Scholar May Seek Pardon*, Wash. Post (May 31, 2001), *at* http://www.washingtonpost.com/wp-srv/aponline/20010531/aponline163859_000.htm.

[37] Christopher E. van der Waerden, Note, *Death and Diplomacy, Paraguay v. United States and the Vienna Convention on Consular Relations*, 45 Wayne L. Rev. 1631, 1651-1652 (1999).

Unless it upholds its reciprocal obligations, the United States cannot effectively assert its authority to provide U.S. citizens with continued access to consular assistance. The danger in a one-sided approach to treaty enforcement is that the United States may become unable to insist on full compliance when other countries shirk their responsibilities, as occurred when Professor Fei-Ling Wang was arrested in China. Professor Wang, a naturalized U.S. citizen, visited China for a study abroad program run by the Georgia Institute of Technology. At the end of the program, he remained in China in order to perform research and visit family and colleagues. He was arrested on July 25, 2004, and accused of spying. Mr. Wang was placed in solitary confinement for four days, and the U.S. consulate was not notified until his tenth day of detention. During that time, he was deprived of sleep, food, and water.[38] After the U.S. Embassy protested the violation of consular treaty rights, Mr. Wang was released from custody and deported.[39] The United States could lose the international leverage it needs to argue against such failures by foreign governments, if it too fails to give full effect to the consular rights of foreign nationals.

Reciprocity in the application and protection of Vienna Convention rights is both a moral imperative and a pragmatic necessity. Non-compliance with essential treaty obligations may engender serious consequences for the violating party. Indeed, it has been universally recognized from the earliest days of treaty-making that "the breach of a material provision of the treaty by one party releases the other party or parties from their obligations under the treaty….[T]he penalty for breach of treaty is to take away the

treaty rights of the breaching party."[40] As codified under Article 60(2) of the Vienna Convention on the Law of International Treaties, a material breach of a multilateral convention by one of the parties entitles any affected party to take sanctioning actions in response, including suspending the operation of the treaty provision "between itself and the defaulting State."[41] Conversely, full domestic compliance "ensures that similar protections will be accorded those that we send abroad to represent the United States, and thus serves our national interest in protecting our own citizens."[42]

President Bush said in his Second Inaugural Address that "[t]he survival of liberty in our land increasingly depends on the success of liberty in other lands."[43] This allusion to the reciprocal aspect of international dynamics has great relevance in the context of this case. Compliance with the VCCR will benefit U.S. citizens while noncompliance puts them at risk. Therefore, the United States must take seriously the ruling issued by the I.C.J., requiring violations of Article 36 rights to be fully examined and taken into account.[44] Simply put, it is "in our own self-interest to uphold the principle of international comity, acknowledge the notification violation that occurred in the case at bar, and provide a remedy."[45]

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[38] Shelia M. Poole, *Tech Prof. Contests China's Spy Charges*, Atlanta J. Const., Aug. 19, 2004.

[39] Daniel Amick, *China releases Tech professor*, Technique News (Aug. 20, 2004), *at* http://new.nique.net/issues/2004-08-20/news/2.

[40] Anthony D'Amato, *International Law as an Autopoietic System* 57 (Nov. 15, 2003), *at* http://www.anthonydamato.law.northwestern.edu/auto/PLANCK-1.pdf (draft paper subject to revisions, to be read at the Max Planck Institute for Comparative Public Law and International Law).

[41] Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, *entered into force* Jan. 27, 1980, art. 60(2)(b).

[42] *Boos v. Barry*, 485 U.S. 312, 323-24 (1988).

[43] President George W. Bush, Inaugural Address (Jan 20, 2005), *available at* http://www.whitehouse.gov/news/releases/2005/01/20050120-1.html.

[44] *Avena and Other Mexican Nationals* (Mex. v. U.S.) 2004 I.C.J. 128 (Mar. 31) ¶ 128.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Fifth Circuit should be reversed.

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[45] *People v. Madej*, 739 N.E.2d 423, 431 (Ill. 2000) (McMorrow J., concurring in part and dissenting in part).

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In The Supreme Court of the United States

JOSÉ ERNESTO MEDELLÍN,
Petitioner,
v.
DOUG DRETKE, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED SATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL DISTRICT ATTORNEYS' ASSOCIATION AS *AMICUS CURIAE*, IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. In a case brought by a Mexican national whose rights were adjudicated by the International Court of Justice in *Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 1 (Mar. 31), must a court in the United States apply as the rule of decision the holding in Avena that the United States courts must review and reconsider the national's conviction and sentence taking account of the violation of his rights under the Vienna Convention on Consular Relations, opened for signature Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261, without resort to procedural default doctrines?

2. In the alternative, in a case brought by a foreign national of a State party to the Vienna Convention, should a court in the United States give effect to the judgments in Avena and *LaGrand (F.R.G. v. U.S.)*, 2001 I.C.J. 466 (June 27), in the interest of judicial comity and uniform treaty interpretation?

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I.
INTEREST OF *AMICUS CURIAE*

The National District Attorneys Association (NDAA) respectfully submits this brief as *amicus curiae* in support of the Respondent in accordance with Supreme Court Rule 39.1.[1] The NDAA is a nonprofit corporation and the sole national membership organization representing local prosecuting attorneys in the United States. Since it's founding in 1950, NDAA's programs of education and training, publications, and amicus curiae activity have carried out its guiding purpose of serving as "the Voice of America's Prosecutors and To Support Their Efforts to Protect the Rights and Safety of the People." Local prosecutors are responsible for an overwhelming majority of the criminal prosecution in this country. The NDAA, and its members, have a compelling interest in the outcome of this appeal because of the impact it will have on criminal prosecutions across this nation.

While the petitioner and many of the amici focus on foreign nationals who have been sentenced to death, Article 36 of the Vienna Convention is not restricted to cases in which the death penalty has been imposed. If the Court adopts the petitioner's arguments, it will have a profound impact on the criminal justice system at every level.

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[1] **In accordance with Supreme Court Rule 37.6, *amici* represents that no other party other than *amici* and counsel for *amici* authored this brief in whole or in part, and no party other than amici and counsel have made a monetary contribution to the preparation or submission of this brief. Global letters of consent from both parties for all *amicus curiae* briefs are on file with the Clerk of this Court.**

II.
SUMMARY OF ARGUMENT

The requirements which Article 36 of the Vienna Convention on Consular Relations impose on law enforcement authorities who arrest and detain foreign nationals for violation of criminal laws are not issues which are in dispute. While those requirements may not have been widely known at the time of the petitioner's trial, that is no longer the case. As a result of this Court's decision in *Breard v. Greene,* most state and federal courts have been addressing claims of violations of Article 36 in a manner consistent with the holdings of the International Court of Justice in *LaGrande* and *Avena* that Article 36 creates individual rights. Requiring defendants to show prior to trial that a violation of Article 36 has harmed them in some way that affected the outcome of their trial fulfills important policy considerations recognized by this Court. It is likewise consistent with the holding in *Avena*. The decisions of the majority of appellate courts which have interpreted Article 36 are consistent with decisions of the courts from other countries, thus achieving reciprocity, comity and uniformity of interpretation of the Treaty. In deciding this case, this Court should continue to require that defendants assert claims of violations of Article 36 at trial as well as show that the violation had a material adverse effect on the outcome of their case.

III.
ARGUMENT

A. What Article 36 Requires Is Not an Issue

The NDAA agrees with the petitioner that the provisions of the Vienna Convention on Consular Relations (VCCR), 21 U.S.T. 77, 596 U.N.T.S. 261, are binding on the states. We also agree that it is incumbent on law enforcement at all levels to insure that foreign nationals[2] are arrested or detained are advised that (1) they have a right to have their consulate informed that they have been detained and (2) that they have the right to communicate with consular officials. We recognize that the failure on the part of state and local officials to comply with the provisions of Article 36 of the VCCR has a direct relationship on the treatment of Americans who are arrested in other countries that are signatories to the VCCR and that it is in the best interest of the United States to comply with the provisions of Article 36. We also agree that a foreign national who is charged with a crime has the right to raise the issue of a violation of Article 36 of the VCCR during the pendency of the criminal proceedings against him or her. Those are issues that are not disputed and are not before this Court in this case.

Rather the issue upon which this Court should focus is the proper scope of "review and reconsideration" to which the petitioner, and other foreign nationals who are similarly situated,[3] may be entitled.

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[2] The United States has bilateral treaties with fifty-nine nations that mandate consular notification in all cases where one of their nationals are arrested. See U.S. Dept. of State, CONSULAR NOTIFICATION AND ACCESS, 47 (2003). The provisions of those treaties are not an issue in this case.

C. Article 36 Issues Are Best Addressed by Trial Courts

Although the United States ratified the VCCR in 1969, it received little attention outside of diplomatic channels during the first ten years following ratification.[4] What little attention it received in either academic or judicial circles focused on those portions of the treaty that dealt with consular immunity. See e.g. *Heaney v. Government of Spain*, 445 F.2d 501 (2d Cir. 1977); *Silva v. Superior Court*, 52 Cal. App. 3d 269; 125 Cal. Rptr. 78 (1975).

> [T]he question of providing individual remedies for failures of consular notification in the context of criminal proceedings first received significant attention within the Department of State in the early 1990s, when a small number of foreign governments began raising with the Department concerns about cases in which one of their foreign nationals on death row had not received consular notification.

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[3] We suggest that the class of foreign nationals who may be entitled to "review and reconsideration" should be limited to those individuals who were convicted prior to this Court's decision in *Breard*.

[4] President Nixon signed proclamation of ratification on December 24, 1969. 21 U.S.T. 77, 185.

U.S. Dept. of State, Department of State Answers to the Questions Posed by the First Circuit in *United States v. Nai Fook Li* at A-1.[5]

As late as 1993, the only guidance that the Department of State provided to state and local governments about Article 36 was a two page memorandum mailed occasionally to state attorneys general. This memorandum "remind[ed] . . . law enforcement personnel that, whenever they arrest or otherwise detain a foreign national in the United States, there **may** be a legal obligation to notify diplomatic or consular representatives of that person's government in this country."[6] Considering that the Department of State had advised state governors in 1970 that "[w]e do not believe that the Vienna Convention will require significant departures from existing practice within the several states of the United States,"[7] it is little wonder that there was widespread ignorance of the requirements of Article 36 at the state and local level prior to 1998.

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[5] Available at U.S. Dept. of State, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 2000, Ch. 2, doc. 1, http://www.state.gov/s/l/6151.htm (hereafter "DoS Answers").

[6] U.S. Dept. of State, *Notice for Law Enforcement Officials on Detention of Foreign Nationals*, (unpublished, April 20, 1993) (hereafter "1993 Notice") (Emphasis added). Nowhere in the 1993 Notice is there any indication that the VCCR is a treaty which imposes legal obligations on law enforcement. The text of the 1993 Memorandum covers two typewritten pages and an Annex containing phone numbers for embassies and consulates. See also Molora Vadnais, *A Diplomatic Morass: An Argument Against Judicial Involvement in Article 36 of the Vienna Convention on Consular Relations*, 47 U.C.L.A. L. Rev. 307, 332 (1999).

[7] DoS Answers at A-9, quoting an April 1970 letter from John R. Stevenson, State Department Legal Advisor to the governors of the states.

Article 36 was not addressed in a published decision by a court in the context of a criminal case against a foreign national until 1996,[8] two years after the petitioner was tried and convicted of murder.

As a result of this Court's decisions in *Breard v. Greene*, 523 U.S. 371 (1998) and *Federal Republic of Germany v. United States*, 526 U.S. 111 (1999), law enforcement throughout the United States has become aware of the consular notification requirements of the VCCR. The Department of State has initiated an extensive outreach program "to insure that . . . law enforcement authorities provide consular information to every arrested person they know or have reason to believe is a foreign national." *Avena and Other Mexican Nationals (Mexico v. United States)*, 2004 I.C.J. 1, 56. In addition state and local governments have enacted statutes[9] or adopted policies[10] implementing the requirements of Article 36 of the VCCR.

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[8] Angel Breard and the Republic of Paraguay brought separate actions in the Eastern District of Virginia in 1996 attacking Breard's conviction and death sentence based on violation of Article 36. *Republic of Para. v. Allen*, 949 F. Supp. 1269 (D. Va. 1996). Prior to that, in 1979, the 9th Circuit Court of Appeals made a passing reference to the Treaty while addressing the violation of an I.N.S. regulation that implemented the notice requirements of Article 36. Article 36 was not specifically cited by the court. See, *United States v. Calderon-Medina*, 591 F.2d 529, 531 (9th Cir. 1979).

[9] See. e.g. Cal. Pen. Code § 834c; Fla. Stat. Ann. § 288.816(f).

[10] See. e.g. State of Georgia, Department of Community Affairs, MODEL LAW ENFORCEMENT OPERATIONS MANUAL, Ch. 8, SOP 8-1 (6th Ed. 1996) available at http://www.dca.state.ga.us/research/law/cover.html.

Although many courts doubted that Article 36 created individual rights which a foreign national could enforce through the courts,[11] most federal and state appellate courts accepted the possibility that it did.[12] As a result, since 1998, state and federal courts have entertained claims of Article 36 violations from foreign nationals. At the same time these courts "generally have held that the defendant must show prejudice." *People v. Preciado-Flores*, 66 P.3d 155, 161 (Colo. Ct. App.,

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[11] See e.g., *United States v. Al-Hamdi*, 256 F.3d 564, 575 n. 13 (4th Cir. 2004); *Bell v. Commonwealth*, 264 Va. 172, 187, 563 S.E.2d 695, 706 (2002), *cert. denied*, 537 U.S. 1123 (2003); *Cauthern v. State*, 145 S.W.3d 571, 626 (Tenn. Crim. App., 2004).

[12] See *United States v. Ademaj*, 170 F.3d 58, 66 - 68 (1st Cir.), *cert. denied*, 528 U.S. 887 (1999); *United States v. Li*, 206 F.3d 56, 62 (1st Cir. 2000); *United States v. Al-Hamdi*, 356 F.3d 564(4th Cir. 2004); *United States v. Jimenez-Nava*, 243 F.3d 192, 198 (5th Cir. 2001); *United States v. Page*, 232 F.3d 536, 541 (6th Cir. 2000); *United States v. Chaparro-Alcantara*, 226 F.3d 616, 621 - 622 (7th Cir.), *cert. denied*, 531 U.S. 1026 (2000); *United States v. Lawal*, 231 F.3d 1045 (7th Cir. 2000), *cert. denied*, 531 U.S. 1182 (2001); *United States v. Santos*, 235 F.3d 1105 (8th Cir. 2000); *United States v. Lombera-Camorlinga*, 206 F.3d 882 (9th Cir. 2000), *cert. denied* 531 U.S. 991 (2000); *United States v. Cordoba-Masquera*, 212 F.3d 1194, 1195 - 1196 (11th Cir. 2000), *cert. denied* 531 U.S. 1131 (2001); *People v. Preciado-Flores*, 66 P.3d 155, 161 (Colo. Ct. App. 2002); *Conde v. State*, 860 So. 2d 930, 953 (Fla. 2003), *cert. denied*, ___ U.S. ____, 158 L. Ed. 2d 475 (2004); *Villegas v. State*, 273 Ga. 824, 826, 546 S.E.2d 504, 507 (2001); *People v. Hernandez*, 319 Ill.App.3d 520, 745 N.E.2d 673 (2001); *Zavala v. State*, 739 N.E.2d 135 (Ind. App. 2000); *State v. Rosas*, 28 Kan.App.2d 382, 17 P.3d 379 (2000); *Ademodi v. State*, 616 N.W.2d 716 (Minn. 2000); *Cardona-Rivera v. State*, 33 S.W.3d 625 (Mo. App. 2000), *cert. denied*, 534 U.S. 826 (2001); *Flores v. State*, 994 P.2d 782, 785 - 786 (Ok. Crim. App. 1999); *State v. Reyes-Camarena*, 330 Or. 431, 434 - 435, 7 P.3d 522, 524 - 525 (2000); *Rocha v. State*, 16 S.W.3d 1, 25 - 46 (Tex. Crim. App. 2000); *Kasi v. Commonwealth*, 256 Va. 407, 508 S.E.2d 57 (1988), *cert. denied*, 527 U.S. 1038 (1989); *State v. Martinez-Lazo*, 100 Wash.App. 869, 873 - 876, 999 P.2d 1275, 1278 - 1279 (2000).

2002), a standard that the I.C.J expressly adopted. *Avena*, 2004 I.C.J. at 51.[13] Thus, this Court can give effect to the *LaGrande (F.R.G. v. U.S.)*, 2001 I.C.J. 466 and *Avena* judgments in so far as the issue of the treaty imposing individual rights without addressing the procedural default doctrine.

Requiring a defendant to raise claims of a violation of Article 36 in the trial court serves several important policy purposes expressed by this Court in *Wainwright v. Sykes*, 433 U.S. 72, 88 - 89 (1977). In the context of a claim of a violation of Article 36, the reasoning of *Wainwright v. Sykes* is equally applicable.

As the Department of State has pointed out, it is difficult to ascertain with any certainty, what, if any, harm occurs to a foreign national defendant if he or she is not notified of his or her rights under Article 36.[14] Even if an arrested individual is advised of his or her rights under Article 36, the individual must request that the consulate be notified. VCCR, Art. 36, 1(b). If the individual asks that his or her consulate be notified, the detaining authorities do not have to do so immediately. "[N]either the terms of the Convention as normally understood, nor its object and purpose, suggest that 'without delay, is to be

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[13] Significantly, the I.C.J. rejected Mexico's position that every violation of Article 36 required "partial or total annulment of conviction or sentence," *Avena*, 2004 I.C.J. at 49, or exclusion of evidence, *Id.* at 50.

[14] DoS Answers at A-4.

understood as 'immediately upon arrest and before interrogation.'" *Avena*, at p. 38.[15]

If a foreign national requests that the consulate be notified and even initiates communication with the consulate, there is no corresponding guarantee that the consulate will do anything. While Mexico offers a wide array of services and support to their nationals who are incarcerated in the United States,[16] there is considerable disparity between the services which are available from the various consulates and embassies of the 180 countries that have missions in the United States due to their own internal policies and resources.[17]

The VCCR does not "require a consular officer to respond to notification, or respond in any particular time period, or to offer any particular service."[18] Unlike the right to counsel which in enshrined in the Constitution and which may be enforced by the courts, even by requiring attorneys to represent indigent defendants without compensation, *Powell v. Alabama*, 287 U.S. 45, 72-73 (1932), our courts are powerless to compel a foreign government to do anything to help their nationals who may be arrested or detained in this country. *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 488 (1983);

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[15] Significantly, the I.C.J. held that notification of the right to have the consulate informed of an arrest and detention does not have to "proceed any interrogation." *Id.* at 39.

[16] See Brief *Amicus Curiae* of the Government of the United Mexican States in Support of Petitioner José Ernesto Medellín, p. 15 - 19.

[17] DoS Answers, A-4, A-5.

[18] DoS Answers, A-4.

Restatement (Third) of the Foreign Relations Law of the United States § 451 (1987).

Compounding the problem of ascribing harm to every failure on the part of law enforcement to notify foreign nationals of their rights under Article 36, is the fact that a only a limited percentage of the foreign nationals who are arrested and detained in the United States request consular notification, even after being advised of their right to consular notification under Article 36 of the VCCR.[19] Despite "Mexico's commitment to the protection of nationals," Brief of *Amicus Curiae* of the Government of the United Mexican States in Support of Petitioner, José Ernesto Medellín, p. 13, and the considerable array of services their consulates offer to their citizens who are arrested and detained in the United States, an overwhelming majority of their citizens do not request consular notification.[20]

These are all factors which trial courts are uniquely positioned to deal with and for which the contemporaneous objection rule exists.

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[19] In 2003, at the request of the Department of State, the State of Georgia conducted a survey of jail admissions in 37 counties during the period from August 31, 2003 through September 14, 2003. During that period 6,920 individuals were detained, 552 of whom were identified as foreign nationals (7.9%). Almost three-fourths (72%) of the foreign nationals were eligible for consular notification under Article 36 of the VCCR (the remainder were from mandatory notification countries). Only 77 (13%) requested that their consulate be notified of their arrest and detention after being advised of their rights under Article 36 of the VCCR.

[20] Only 47 of the 355 Mexican nationals arrested and detained (13%) in Georgia during the survey period requested consular notification.

C. Reciprocity, Comity & Uniformity

Petitioner argues that this Court should, at a minimum revisit this Court's decision in *Breard*, while at the same time urging this Court reverse the decision of the court below in the interest of reciprocity, comity and uniformity of interpretation. *Brief of Petitioner*, p. 45-50.

An examination of the holdings of courts of other nations which have considered violations of Article 36 shows that the courts of this country are interpreting the treaty in a way which is in harmony with the courts of other countries. See *R. v. Abbrederis*, 36 A.L.R 190, [1981] 1 NSWLR 530 (New South Wales, Australia); *Re Yater*, 77 Int'l L. Rep. 541 (Italy; Ct. of Cassation, 1973); *R. v. Partak*, 2001 160 C.C.C. (3d) 533, 570 (Ontario, Canada S.Ct. of Justice); *Canada v. Van Bergen*, 161 A.R. 387, 390 (Alberta, Ct. of App. 2000); BGH 5 StR 116/0 (German Fed. S. Ct. 2001); *Public Prosecutor v. Nguyen Tuong Van*, [2004] SGHC 54, 2 S.L.R. 328 (Singapore, High Ct. 2004). We are aware of no appellate court anywhere in the world, and petitioner does not cite any decision of any court outside the United States, that interprets the treaty as expansively as does the petitioner. If this Court interprets the Treaty in the manner suggested by the petitioner and many of his *amici*, it will be the United States that is out of step with the rest of the world.

CONCLUSION

This Court can give effect to the *LaGrande* and *Avena* judgments to the extent that they confirm that Article 36 confers individual rights on foreign nationals who are arrested in the United States while at the same time affirming the judgment of the court of appeals.

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IN THE

Supreme Court of the United States

JOSE ERNESTO MEDELLIN,
Petitioner,
v.
DOUG DRETKE, Director,
Texas Department of Criminal Justice Institutional Division
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR PROFESSORS OF INTERNATIONAL LAW, FEDERAL JURISDICTION AND THE FOREIGN RELATIONS LAW OF THE UNITED STATES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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ARGUMENT 2

I. The requirements of 28 U.S.C. § 2253, which governs federal appellate jurisdiction to hear this case, have not been met because applicant has not made a substantial showing of the denial of a constitutional right 2

II. The Optional Protocol to the Vienna Convention on Consular Relations, the United Nations Charter and the Statute of the International Court of Justice do not obligate the courts of the United States to implement the *Avena* decision of the International Court of Justice, and any interpretation of these treaties to the contrary would raise substantial constitutional concerns 8

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III. Neither comity nor the need for uniformity in treaty interpretation justifies a federal judicial order requiring Texas to provide a hearing on petitioner's Vienna Convention claim. No other country has understood the Vienna Convention as obligating its courts to implement the ICJ's interpretation of the Vienna Convention. It is not generally the practice of other countries to interpret their treaty commitments as delegating to international bodies the authority to render judgments in particular disputes that will have direct effect in domestic law, especially as to persons who do not have standing to participate in such bodies' proceedings 20

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INTEREST OF THE *AMICI CURIAE*

Amici are professors and scholars of law with expertise in international law, federal jurisdiction, and the foreign relations law of the United States. This case raises important questions concerning the authority of an international tribunal to make direct changes in a core area of U.S. domestic law, namely the procedural prerequisites for an individual's assertion of a legal right in the course of a criminal prosecution. Acceptance of the arguments put forward by petitioners would disregard the authority of Congress to determine the conditions under which federal courts can exercise habeas jurisdiction and bring about an unprecedented, profound, and, in our view, undesirable change in the relationship between international organizations and domestic lawmaking in the United States.

SUMMARY OF ARGUMENT

Pursuant to 28 U.S.C. § 2253(c)(2), a habeas petitioner must make a "substantial showing of the denial of a constitutional right" in order to appeal a federal district court's refusal to issue a writ. The petitioner here alleges only the violation of a right based on a treaty, which presents no independent constitutional claim. Even if there were no statutory bar to the consideration of petitioner's claim at this stage of habeas review, decisions of the International Court of Justice are not directly enforceable in U.S. courts. Compelling the lower federal courts to implement a decision of the International Court of Justice, which can hear only disputes between sovereigns, would bring about an unprecedented upheaval in the relationship of international bodies to our domestic law. In particular, the use of an international body's determination to invalidate a State's appropriate and neutral procedural default rule may very well violate fundamental principles of federalism, the separation of powers, and Article III. Considerations of comity and uniform treaty interpretation do not support this outcome. To the contrary, other countries' legal systems, as well as the European Court of Justice, generally do not recognize such a delegation of lawmaking power to an international body.

ARGUMENT

I. The requirements of 28 U.S.C. § 2253, which governs federal appellate jurisdiction to hear this case, have not been met because applicant has not made a substantial showing of the denial of a constitutional right.

Both lower courts in this case denied petitioner a certificate of appealability pursuant to 28 U.S.C. § 2253, as amended by the Antiterrorism and Effective Death Penalty Act of 1996. Through this provision, Congress limited appeals of a federal district judge's habeas review of state criminal convictions to those instances where "the applicant has made a substantial showing of the denial of a constitutional right." On several occasions this Court has recognized that satisfaction of this standard is a jurisdictional prerequisite to appellate consideration of a habeas application and that § 2253 limits judicial review to consideration of claims based on constitutional rights. *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Before this Court, petitioner alleges no violation of any constitutional right. Rather, his claims rest only on the Vienna Convention on Consular Relations, April 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 (Vienna Convention), and the Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, April 24, 1963, 21 U.S.T. 325, 596 U.N.T.S. 487 (Optional Protocol). Neither of these international treaties establishes a constitutional right, and a violation of their provisions does not constitute a "denial of a constitutional right" within the meaning of § 2253.

In *Murphy v. Netherland*, 116 F.3d 97 (4th Cir.), *cert. denied*, 521 U.S. 1144 (1997), the Fourth Circuit held that a Mexican national's allegation that Virginia had violated his rights under the Vienna Convention did not satisfy the requirements for issuance of a certificate of appealability under § 2253. In particular, the court rejected the argument that the term "constitutional right" in that statute encompassed claims derived from the Supremacy Clause:

> Although states may have an obligation under the Supremacy Clause to comply with the provisions of the Vienna Convention, the Supremacy Clause does not convert violations of treaty provisions (regardless whether those provisions can be said to create individual rights) into violations of constitutional rights.

Murphy v. Netherland, *supra*, at 99-100.

The *Murphy* court's argument clearly is correct. The Supremacy Clause expresses a fundamental principle about the relationship of federal and state law, but does not vest any rights or interests in people as such. This Court and Congress both appreciate the important distinction between constitutional rights, which exist independent of any legislative decisions, and other rights under federal law, which depend on the existence of duly authorized enactments. This Court and Congress also have recognized that treaty rights, to the extent they exist, stand on the same footing as those based on a federal statute.[1]

For over two hundred years this Court has stated that treaties, to the extent they create any rights over which a court can take cognizance, have exactly the same status as legislation enacted by Congress. *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801); *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829); *Whitney v. Robertson*, 124 U.S. 190, 194 (1888); *Reid v. Covert*, 354 U.S. 1, 18 (1957) (plurality opinion); *Breard v. Greene*, 523 U.S. 371, 376 (1998). This concept of the interchangeability of treaties and other federal legislation for the purposes of judicial decisionmaking extends to the construction of federal statutes. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 208 n.17 (1978) (same canons apply to Indian treaty and statutory construction). Cf. *Chickasaw Nation v. United States*, 534 U.S. 84, 99 (2001) (O'Connor, J., dissenting) (same canons of construction apply to treaties and statutes; form of enactment is irrelevant).

Especially instructive is Justice Harlan's discussion of the relationship of constitutional questions, the Supremacy Clause, and treaty interpretation. In *Zschernig v. Miller*, 389 U.S. 429, 443-45 (1968) (concurring opinion), he argued that the majority disregarded the prudential teaching of *Ashwander v. TVA*, 297 U.S. 298, 341 (1936) (Brandeis, J., concurring), which calls for the avoidance of deciding unnecessary constitutional questions, when it held that an Oregon statute unconstitutionally encroached on the federal power over foreign relations. In Harlan's view, a treaty with Germany provided a sufficient basis for invalidating the statute. In a footnote, he recognized that either approach entailed the invocation of a constitutional provision to nullify a State statute, but he explained that using the Supremacy Clause does not involve constitutional adjudication within the meaning of the *Ashwander* doctrine:

> It is true, of course, that the treaty would displace the Oregon statute only by virtue of the Supremacy Clause of the Constitution. Yet I think it plain that this fact does not render inapplicable the teachings of *Ashwander*. Disposition of the case pursuant to the treaty would involve no interpretation of the Constitution, and this is what the *Ashwander* rules seek to bring about.

389 U.S. at 445 n. 4.

This Court consistently has understood a statutory reference to constitutional issues as not extending to statutory or treaty questions in spite of the background role of the Supremacy Clause. For example, in *Swift & Co. v. Wickham*, 382 U.S. 111 (1965), the Court interpreted 28 U.S.C. § 2281, a statute requiring the use of a three-judge court to hear challenges to state statutes based "upon the ground of the unconstitutionality of such statute." The Court had no difficulty deciding that a claim that a State statute conflicted with federal legislation did not fall within this jurisdictional provision, notwithstanding the necessity of the Supremacy Clause to the plaintiffs' claim. *Id.* at 120-23. The Court noted that a consistent line of earlier decisions had taken for granted that arguments grounded on the Supremacy Clause did not impugn the constitutionality of a statute within the meaning of § 2281. Similarly, in *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 612-15 (1979), the Court interpreted 28 U.S.C. § 1343(3)'s reference to "any right, privilege or immunity secured . . . by the Constitution" as not extending to Supremacy Clause claims. Cf. *Maine v. Thiboutot*, 448 U.S. 1 (1980) (interpreting 42 U.S.C. § 1983 as extending to cases of conflicts between federal and state law because of statute's use of term "and laws," not because Supremacy Clause claims rest on Constitution).

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[1] As we argue in Part II of this brief below, an interpretation of the Optional Protocol or other international instruments as binding the courts of the United States to fulfill the orders of the International Court of Justice would raise significant constitutional questions concerning federalism, the separation of powers, and Article III. These structural constitutional issues, however, do not entail the *denial* of any constitutional *right* belonging to petitioner. Moreover, the constitutional question would arise only if petitioner's treaty-based claim were accepted.

Acts of Congress dealing with the jurisdiction of the federal courts consistently reflect an understanding that claims based on the constitution, within the meaning of these statutes, are distinct from those based on other sources of federal law, even when asserted against the States under the Supremacy Clause. Of direct relevance here is 28 U.S.C. § 2254(a), which authorizes federal courts to hear challenges to a State criminal conviction on the ground that the applicant's custody is "in violation of the Constitution or laws or treaties of the United States." See also, *e.g.*, 28 U.S. § 1254(2) (appellate jurisdiction of Supreme Court); § 1257(a) (certiorari jurisdiction of Supreme Court); § 1258 (Supreme Court jurisdiction as to judgments of Puerto Rican courts); § 1331 (federal question jurisdiction of federal courts). In each of these instances, the reference to the laws and treaties of the United States would be superfluous if Congress believed that a reference to constitutional claims incorporated treaty violations. *Swift & Co. v. Wickham*, *supra*, at 126; *Chapman v. Houston Welfare Rights Organization*, *supra*, at 614-15. The contrast between the language of § 2254(a) and the standards for appeal under § 2253(c)(2), in light of this longstanding and well established jurisprudence, leads to an irresistible inference that Congress did not authorize the federal courts to entertain claims based on violation of a treaty when hearing appeals from denials of habeas petitions.

The argument that § 2253 does not apply in this case because of conflicting and superior authority is not plausible. To the extent one can perceive any inconsistency between the Vienna Convention and the requirements of § 2253, the latter enacted statute, adopted in 1996, clearly would prevail over the Convention, which went into effect as to the United States in 1969. *Breard v. Greene*, *supra*, at 376. The decision of the International Court of Justice in *Avena and Other Mexican Nationals (Mexico v. United States)*, 2004 I.C.J. 1, is not an independent subsequent enactment, but rather one body's interpretation of the meaning of the earlier Convention. Thus neither the Optional Protocol nor the *Avena* decision can override the clear and later-in-time limitation on appellate court jurisdiction found in § 2253.

Finally, while U.S. courts historically have sought to interpret congressional enactments so as not to violate the nation's international obligations, see *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804), that doctrine cannot apply here. First, this Court consistently has said that it will not apply the *Charming Betsy* doctrine to frustrate the clearly expressed intent of Congress. *United States v. Dion*, 476 U.S. 734 (1986); *Whitney v. Robertson*, 124 U.S. 190 (1888); *Cherokee Tobacco Case*, 78 U.S. 616 (1871). In light of the language of § 2253(c)(2), the intent of Congress to preclude nonconstitutional claims in federal habeas appeals is unmistakable. Second, even if one were to conclude that the *Avena* interpretation of the Vienna Convention constitutes an accurate statement of the international law obligations of the United States, nothing in the *Avena* decision compels *federal* judicial review of petitioner's claim. Cf. *Torres v. Oklahoma*, No. PCD-04-442 (Okla. Crim. App. 2004). Thus, no conflict exists between the statute and international law.

II. The Optional Protocol to the Vienna Convention on Consular Relations, the United Nations Charter and the Statute of the International Court of Justice do not obligate the courts of the United States to implement the *Avena* decision of the International Court of Justice, and any interpretation of these treaties to the contrary would raise substantial constitutional concerns.

By not distinguishing the legal interests at stake in this case, petitioner attempts to bootstrap a remarkable, unprecedented and disturbing new rule of law onto several well established and uncontroversial principles. The issue here is not whether petitioner enjoys rights established by the Vienna Convention that he may assert in a court in the United States. Nor does it involve the willingness of this Court to regard decisions of the International Court of Justice (ICJ) as evidence of the content of international law in cases that depend on international law for their resolution. See, *e.g.*, *United States v. Maine*, 475 U.S. 89 (1986) (looking to 1951 ICJ decision as evidence of rule of decision to be applied in dispute over seabed ownership); *United States v. Louisiana*, 470 U.S. 93 (1985) (same).[2] Rather, petitioner maintains that, as a result of an order of the ICJ, the courts of the United States have lost the authority to apply neutral procedural rules in a criminal proceeding to ensure that a competently represented criminal accused will assert claims based on treaties in a timely manner. In particular, petitioner maintains that exactly the procedural rules that this Court regards as consistent with Texas's obligation to safeguard rights

guaranteed by the Constitution of the United States are insufficient to protect his interests under the Vienna Convention. To reach this result, petitioner imputes to several instruments of international law – the United Nations Charter, June 26, 1945, 59 Stat. 1031(UN Charter), the Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1055 (Statute of the ICJ), and the Optional Protocol – a meaning that is unprecedented in U.S. practice and which, if accepted, would raise substantial constitutional issues.

We note some of the practical implications of accepting petitioner's argument:

- First, the *Avena* decision of the ICJ seems to require that an accused receive a post-conviction hearing to consider claims based on the Vienna Convention, even if a well counseled accused were deliberately to bypass an opportunity to raise the claim during the course of trial. *Avena*, *supra*, at 45-46, 51-52. Such an outcome would endow criminal defendants eligible to invoke the Vienna Convention with a strategic weapon, unavailable to all others accused of a crime, that this Court long has recognized as inconsistent with general standards of equity and administrability. *E.g.*, *Fay v. Noia*, 372 U.S. 391, 433, 438 (1963).

- Second, the *Avena* decision applies to all persons with a Vienna Convention claim, not just to those sentenced to death, and thus opens the way for perhaps many thousands of demands for post-conviction review.

- Third, a holding that the decision of the United States to submit to international adjudication, without more, creates rights that individuals can assert in domestic courts likely would inhibit the United States from submitting to international adjudication in the future, and may induce the United States to denounce the Optional Protocol and other existing commitments to international adjudication.

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[2] On occasion this Court also has indicated a willingness to disregard or narrow the scope of arguments based on ICJ judgments when ascertaining the content of international law. See, *e.g.*, *Sosa v. Alvarez-Machain*, 542 U.S. __, 124 S. Ct. 2739, 2768 (2004) (ICJ decision in Iranian embassy case did not establish a rule of law cognizable under 28 U.S.C. § 1350 prohibiting arbitrary detentions).

None of these unwanted outcomes is inevitable, because under U.S. law as traditionally understood none of the international treaties at issue in this case provides a basis for application of the *Avena* order by our domestic courts. U.S. law on the role of international obligations in the domestic legal order is clear, at least at the structural level. On the one hand, the United States intends that some of its treaties be self-executing, in the sense that they will supply a rule of decision that courts must apply in a lawsuit. On the other hand, this Court often has recognized that the United States may intend for a treaty to create obligations only on the plane of international law and in the anticipation of later implementation by the political branches. To ascertain whether a treaty is self-executing or instead requires further implementing enactments, a court must consider the treaty's text, the background assumptions of the parties as illustrated by past practice, the general context, and other means generally used for determining the intention of a legal instrument's authors. Compare *Foster v. Neilson*, *supra*, and *United States v. de la Maza Arredondo*, 31 U.S. (6 Pet.) 691 (1832), with *Murray v. Schooner Peggy*, *supra*, and *United States v. Percheman*, 32 U.S. (7 Pet.) 51 (1833). See also *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 442-43 (1989); *Head Money Cases*, 112 U.S. 580, 598-99 (1884).

When one applies these general principles to the treaties on which petitioner relies, the conclusion is irresistible that the United States in each instance intended not to create self-executing obligations with direct effect in the U.S. domestic legal order. We discuss each in turn.

First, one must recognize that the Vienna Convention and the Optional Protocol are distinct international instruments with independent legal significance. We assume for purposes of this dispute that the United States intended for the Convention to be self-executing and to have direct effect in U.S. law. There is no evidence, however, that the United States or any other state party regards the Optional Protocol as also self-executing or having direct effect. It would have been remarkable if any party had so believed this, given the normal understanding of the relationship between the decisions of international bodies and domestic law.

Article I of the Optional Protocol provides:

> Disputes arising out of the interpretation or application of the Convention shall lie within the *compulsory jurisdiction* of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute *being a Party to the present Protocol.* (emphasis added)

Petitioner argues in effect that the term "compulsory jurisdiction" establishes not only the capacity of the ICJ to render an authoritative determination of the questions in dispute, but also the authority to enforce its decisions through the automatic enlistment of other judiciaries to carry out its orders. Yet Article I contains limitations that are clearly inconsistent with such enforcement powers. By its terms, Article I permits only a Party to appear before the ICJ. The Optional Protocol thus reflects the general structure of ICJ dispute resolution, which extends only to controversies between and among sovereign states. Individuals have no standing to appear on their own behalf before the ICJ, and can derive no rights or interests directly from ICJ decisions. The same, for that matter, is true of Texas, which is a subordinate jurisdiction of the United States and not capable of being a party to an ICJ proceeding. Neither can the ICJ hold anyone other than a sovereign state responsible for violation of any rights determined through its proceedings.[3]

Significantly, no court of the United States ever has understood as self-executing a treaty pursuant to which the United States has acceded to the compulsory jurisdiction of the International Court of Justice. This Court never has addressed the issue. The leading lower court decision is *Committee of United States Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929 (D.C. Cir. 1988). The plaintiffs there argued that the United States' ongoing disregard of an order of the ICJ, arising out of a matter within the ICJ's compulsory jurisdiction, had caused them direct injuries for which a federal court could grant relief. The ICJ had based its jurisdiction on Article 36(2) of the Statute of the International Court of Justice, pursuant to which the United States has accepted the compulsory jurisdiction of the ICJ with respect to most international law disputes concerning other states.[4]

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[3] To the extent the legislative history of the Optional Protocol is relevant, one should note that a representative of the State Department explained in testimony before the Senate, regarding the legal effect of the Optional Protocol, "[i]f problems should arise regarding the interpretation or application of the convention, such problems would probably be resolved through diplomatic channels." Vienna Convention on Consular Relations, Sen. Exec. Rpt. 91-9, 19 (1969) (Statement of J. Edward Lyerly, Deputy Legal Adviser for Administration). Additionally, "*parties* to the optional protocol may agree to resort to . . . an arbitral tribunal" or conciliation. *Id* (emphasis added). Nothing in this testimony suggests that the United States anticipated that accession to the Optional Protocol would open up literally thousands of future criminal convictions to federal habeas review.

[4] Midway through the proceedings in the *Nicaragua* case, the United States withdrew its consent to ICJ jurisdiction. The ICJ ruled that, as to

Article 36(2) entailed an even greater and more comprehensive derogation of sovereignty in favor of the ICJ than does the Optional Protocol, yet the District of Columbia Circuit court had no difficulty in finding that the ICJ order had no effect on the domestic law of the United States.

A review of the other international treaties on which petitioner relies buttresses the conclusion that he cannot invoke the order of the ICJ in a U.S. court. Article 94(1) of the UN Charter, a treaty to which the United States is a party, imposes on states an obligation "to comply with the decision of the International Court of Justice in any case to which it is a party." Article 94(2), however, specifies that enforcement of that obligation rests with the UN Security Council. No nation ever has inferred from Article 94(1) an obligation on the part of a state's judiciary independently to compel compliance, and the *Committee of United States Citizens Living in Nicaragua* court squarely rejected that interpretation. It ruled that Article 94 "simply does not confer rights on private individuals." *Committee of United States Citizens Living in Nicaragua v. Reagan*, *supra*, at 937.

The Statute of the International Court of Justice, also a Treaty to which the United States is a party, reinforces this conclusion. Article 59 of the Statute states expressly that: "The decision of the Court has no binding force except between the parties and in respect of that particular case." The court in *Committee of United States Citizens Living in Nicaragua*, after quoting this language, observed:

> Taken together, these Charter clauses make clear that the purpose of establishing the

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that dispute, this withdrawal was ineffective. *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, 1986 I.C.J. 14, 23-25. It proceeded to reach the merits of the case and issued an order requiring the United States to end its intervention in Nicaraguan affairs.

> ICJ was to resolve disputes *between national governments*. We find in these clauses no intent to vest citizens who reside in a U.N. member nation with authority to enforce an ICJ decision against their own government.

Id. at 938 (citations omitted).

It is immaterial that here petitioner seeks to assert rights under the Vienna Convention against a state of which he is not a subject, rather than rights under general and customary international law against his own government, or that the ICJ order in *Avena* referred to petitioner, while the order in the *Nicaragua* dispute did not expressly incorporate the plaintiffs. Neither of these aspects of the case affects the holding of the District of Columbia Circuit court: Pursuant to UN Charter and the ICJ's Statute, the ICJ can bind only parties to a dispute. The Optional Protocol does not alter, but rather confirms, this result. Under that treaty, Texas and petitioner were not, and could not be, parties to an ICJ proceeding.

The fundamental character of ICJ dispute resolution as an exclusively interstate proceeding does not mean that individuals may derive nothing of significance from the outcome of an ICJ decision, or that compliance with a state's obligations, as determined by the ICJ, has nothing to do with how that state treats particular individuals. Rather, Article I of the Optional Protocol, like Article 94 of the UN Charter and Article 59 of the Statute of the International Court of Justice, reflects the traditional and widely recognized distinction between the rights and obligations of states in relation to each other, the traditional subject of international law, and the legal mechanisms through which a state acts in response to its

international obligations, which is ultimately a question of domestic law. The ICJ has jurisdiction to determine that the United States is responsible under international law for the treatment of petitioner. It is up to U.S. law, however, to determine which level and branch of government has the authority to take steps to bring the United States into compliance with its obligations to Mexico. And nothing in U.S. law assigns that authority to the judiciary.

The limited scope of ICJ orders in the domestic legal order of the United States is far from atypical. We are unaware of any international instrument establishing a tribunal's compulsory jurisdiction that ever has sufficed in and of itself to make that tribunal's orders binding on U.S. courts. Rather, some additional act of the political branches, typically a separate statutory enactment, always has been a prerequisite to giving an international tribunal the authority to determine rights and duties in a manner that can bind the courts of the United States.

Consider the case of investment disputes covered by Chapter 11 of the North American Free Trade Agreement, Dec. 17, 1992, H.R. Doc. 103-159 (1993), 32 I.L.M. 605 (1992) (NAFTA). That agreement expressly incorporates the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 17 U.S.T. 1270, T.I.A.S. No. 6090, 575 U.N.T.S. 159 (ICSID Convention), a treaty to which the United States is a party. See NAFTA Articles 1120, 1136, 1139. With respect to the ICSID Convention, Congress enacted 22 U.S.C. §§ 1650, 1650a to enable U.S. courts to enforce arbitral awards against states, including the United States. It is these statutory provisions that enable a U.S. court to order enforcement of an arbitral award based on NAFTA's investor protection obligations, and not any provision in NAFTA or the ICSID Convention itself. Also noteworthy is 19 U.S.C. § 1516a, which recognizes the authority of the international tribunals stipulated by NAFTA to hear appeals from certain customs determinations by U.S. administrative authorities. Each of these instances illustrates the well entrenched pattern of U.S. law: Additional legislation is a prerequisite to judicial enforcement of the orders of an international tribunal, even after the United States has consented to that tribunal's jurisdiction.

This pattern is, if anything, even clearer with respect to dispute resolution under the auspices the World Trade Organization (WTO). In approving the Uruguay Round Trade Agreements, April 15, 1994, 1868 U.N.T.S. 3, H.R. Doc. 103-316 (1994), Congress provided for the exclusive authority of the Executive Branch to enforce WTO rules, including the decisions of that organization's dispute resolution body. This legislation used identical language to that approving NAFTA. In both instances, Congress explicitly forbade the judiciary from invalidating any federal or State law on the basis of the international agreement in question, except in a lawsuit brought by the United States. North American Free Trade Agreement Implementation Act of 1993, § 102(b)(2) (codified at 19 U.S.C. § 3312(b)(2)); Uruguay Round Agreements Act of 1994, § 102(b)(2) (codified at 19 U.S.C. § 3512(b)(2)).

Nor is dispute resolution under these trade agreements *sui generis*. The United State consistently has adopted separate legislative authorization for any domestic judicial enforcement power resulting from acceptance of international adjudication. For example, on numerous occasions throughout our history, the United States entered into international agreements to settle disputes over injuries suffered by individuals. Often the agreement authorized a tribunal of some sort to determine liability and damages, after which one state would make a payment to the other. Since

1863, federal statutory law has made the practice of separate legislative authority for domestic judicial enforcement explicit by forbidding the U.S. courts from issuing money judgments against the United States based solely on an international tribunal's decision:

> Except as otherwise provided by Act of Congress, the United States Court of Federal Claims shall not have jurisdiction of any claim against the United States growing out of or dependent upon any treaty entered into with foreign nations.

28 U.S.C. § 1502.

This Court consistently has adhered to § 1502 while reaffirming the general principle that, as to the federal judiciary, the decisions of international tribunals affect only sovereign rights and not the legally enforceable interests of individuals. *See, e.g., La Abra Silver Mining Co. v. United States*, 175 U.S. 423 (1899) (claim derived from Convention Between Mexico and the United States of 1868 subject to judicial consideration only pursuant to 1892 statute); *United States* v. *Blaine*, 139 U. S. 306, 323 (1891) (same Convention: "The government assumed the responsibility of presenting his claim, and made it its own in seeking redress in respect to it."); *United States v. Weld*, 127 U.S. 51 (1888) (1871 Treaty of Washington); *Alling v. United States*, 114 U.S. 562 (1885) (1868 Mexico-United States Convention); *Great Western Insurance Co. v. United States*, 112 U.S. 193 (1884) (1871 Treaty of Washington); *Frelinghuysen* v. *Key*, 110 U. S. 63, 74 (1884) (1868 Mexico-United States Convention: "No nation treats with a citizen of another nation except through his government.").[5]

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[5] The Brief *Amicus Curiae* of the Government of the United Mexican States in Support of Petitioner, at 4-11, refers to NAFTA and the

Contemporary cases confirm this understanding of the relationship between international claims settlement and domestic law. In particular, *Dames & Moore v. Regan*, 453 U.S. 654 (1981), recognized that the legal basis for establishing the Iranian claims settlement process, which entailed extinguishing the right to bring lawsuits in the United States and instead relegating claimants to an international tribunal, comprised Treasury Regulations issued pursuant to statutory authority and the President's Article II powers to conduct foreign relations, and not the agreement between the two states itself. Cf. *Dames & Moore v. Regan* at 689-90 (indicating that any subsequent takings claims for losses caused by extinction of lawsuits would not be derived from the international agreement). Subsequent cases have confirmed that the Treasury Regulations, and not the terms of the international agreement, determine the legal basis of claims related to the Iranian dispute. *Islamic Republic of Iran v. Boeing Co.*, 771 F.2d 1279 (9th Cir. 1985); *Electronic Datas Systems Corp. Iran v. Social Security Org.*, 651 F.2d 1007 (5th Cir. 1981).[6]

Convention that was the subject of the Court's decisions in the above cases as examples of binding dispute resolution. It fails to note, however, that none of the cited instances involved an international agreement that of its own force produced direct effects in the domestic legal order of the United States.

[6] Similarly, U.S. judicial enforcement of international arbitral awards produced in accordance with the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, a treaty to which the United States is a party, rests on separate legislation, specifically 9 U.S.C. §§ 201-07. This legislation limits the scope of the U.S. obligations to arbitrations of a commercial nature and provides expressly that only parties to an arbitration to which the Convention applies can invoke this enforcement power. *Id.* §§ 202, 207.

Were this Court, by interpreting the Optional Protocol as self-executing, to depart from two centuries of consistent practice and widely held assumptions about the relationship of domestic law to international tribunals, it then would face substantial constitutional questions. In the context of this case, involving a state's administration of its criminal justice process, the interposition of an international tribunal's authority would raise novel issues about the limits of our federalism, the requirements of Article III, and the constitutional separation of powers. This Court consistently has recognized and safeguarded the primacy of the States' role in the administration of criminal justice, *e.g.*, *United States v. Morrison*, 529 U.S. 598, 618 (2000); *United States v. Lopez*, 514 U.S. 549, 561 (1995). The Court also has understood Article III as protecting the judicial department from interference by the other departments. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995). It would be remarkable, to say the least, to hold simultaneously that a particular legal instrument constituted federal law subject to adjudication, but that this Court lacked the ultimate authority to determine what it means. Cf. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."). Transgression of these constitutional principles would be problematic, even if brought about by a treaty rather than a statute adopted by both Houses of Congress. *Reid v. Covert*, 354 U.S. 1, 16 (1957) (plurality opinion) ("The obvious and decisive answer to this, of course, is that no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution.").

Due to the unprecedented nature of petitioner's argument, no court has had to confront these constitutional questions. The scholarly literature, although necessarily speculative, suggests that the issues are grave and significant.

See, *e.g.*, Curtis A. Bradley, *International Delegations, the Structural Constitution, and Non-Self-Execution*, 55 STAN. L. REV. 1557, 1567-80 (2003) (discussing separation of powers and Article III problems raised by self-executing ICJ judgments); Jim C. Chen, *Appointments with Disaster: The Unconstitutionality of Binational Arbitral Review under the United States-Canada Free Trade Agreement*, 49 WASH. & LEE L. REV. 1455 (1992); Julian G. Ku, *The State of New York Does Exist: How the States Control Compliance with International Law*, 82 N.C. L. REV. 457, 510-521 (2004) (discussing federalism problems of self-executing ICJ judgments); A. Mark Weisburd, *International Courts and American Courts*, 21 MICH. J. INT'L L. 877, 891-900 (2000) (discussing Article III problems with self-executing ICJ judgments). The general policy of avoidance of difficult and significant constitutional questions should provide this Court with a further reason for not giving the Optional Protocol a gloss that neither the plain language of the treaties nor the longstanding understanding of their meaning supports.

III. Neither comity nor the need for uniformity in treaty interpretation justifies a federal judicial order requiring Texas to provide a hearing on petitioner's Vienna Convention claim. No other country has understood the Vienna Convention as obligating its courts to implement the ICJ's interpretation of the Vienna Convention. It is not generally the practice of other countries to interpret their treaty commitments as delegating to international bodies the authority to render judgments in particular disputes that will have direct effect in domestic law, especially as to persons who do not have standing to participate in such bodies' proceedings.

Petitioner argues that even if the orders of the ICJ do not have direct effect in U.S. law so that a U.S. court

must enforce them, the judiciary nonetheless should offer enforcement in a spirit of "comity" with the ICJ and support for uniform treaty interpretation. Brief for Petitioner at 45-50. These arguments are misconceived at several levels.

First, the doctrine of comity, which has its origins in the Treaty of Westphalia and the concepts of sovereign power that the settlement of the Thirty Years War established, applies to sovereigns, not to international bodies that themselves are the product of international agreements. *Hilton v. Guyot*, 159 U.S. 113, 164 (1895), clearly states that comity constitutes "the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another *nation*." (emphasis added). This distinction is not a mere formality: International law rests on the choices and behavior of states. An international organization is the creature of international law, and has only so much authority as the instrument that establishes it specifies. Extending the authority of an international body through common law doctrines such as comity circumvents, rather than reinforces, the choices made in the body's foundational instrument.

Second, even if the comity doctrine were applicable here, the policy judgments on which it rests must give way in the face of well established and widely accepted domestic policy. This Court has reaffirmed the necessity of neutral procedural rules to ensure the timely consideration of all legal rights of a criminal accused. It has observed on many occasions that its upholding of State procedural-default rules reflects a respect for "finality, comity, and the orderly administration of justice." *Dretke v. Haley*, 541 U.S. 386, __, 124 S. Ct. 1847, 1849 (2004). See *Coleman* v. *Thompson*, 501 U.S. 722, 726 (1991); *McCleskey* v. *Zant*, 499 U.S. 467, 493 (1991). There has been no claim here that the rules applied by Texas to determine whether petitioner forfeited his claim under the Vienna Convention represent any kind of hostility to, or subversion of, any federally protected interest, whether derived from the Constitution or other federal law. Allowing the desire to show proper respect to the ICJ to outweigh the authority of Texas to develop and apply neutral procedural rules would constitute an unprecedented sacrifice of crucial local interests to an inchoate and ultimately unfounded international concern. As we noted above, the implications of such a decision would include requiring the federal courts to review many thousands of criminal convictions based on claims of Vienna Convention violations and providing persons from Vienna Convention countries accused of a crime with a remarkable weapon for strategic use of these claims.

Neither does this case present any issue about uniform treaty interpretation.[7] A conclusion that the political branches of the United States, and not the judiciary, have the

responsibility of determining how the United States will meet its obligations under the Vienna Convention in no way conflicts with the ICJ's interpretation of that Convention. To the contrary, the *Avena* decision determined only the content of the obligations imposed by the Convention, and not the process by which the United States can choose to bring itself into compliance with those obligations. The affirmance by this Court of the decision of the court below will not interfere in any way with the power of the President and Congress to pursue measures to satisfy Mexico's interests, as determined by the *Avena* decision.

Were this Court to regard the *Avena* decision as obligating the judiciary of the United States, and not the political branches, to implement the Vienna Convention, it would depart from, rather than reinforce, generally accepted international understandings about the relationship between international obligations and domestic law. Other countries do not normally interpret a treaty acceding to the jurisdiction of an international tribunal as imposing on domestic courts the responsibility for enforcing the orders of such tribunals. The only significant exception to this principle is the case of the judicial bodies of the European Community. But the European Community constitutes a *sui generis* attempt to create an extensive legal regime embracing the member states, not a template for general international law. And even the European Court of Justice, the principal judicial body of the European Community, has rejected the possibility that it could act as an enforcing agent for any other international tribunal.

Considering first the International Court of Justice, our research has turned up no instance where a nation has clearly embraced the principle of direct enforcement of ICJ orders. The universal practice is to regard ICJ decisions as important evidence of the content of international law in cases where such law is relevant to a matter otherwise before a national court, but not as independent grounds for a national court's authority. Nations understand that their legislatures and governments, not their judiciaries, have the primary responsibility for bringing themselves into compliance with ICJ orders. We are unaware of any instance, and petitioner and the various *amici* in support of petitioner cite to no instance, where another state through a court decision has mandated the direct enforcement of an ICJ order.[8] For a comprehensive review of foreign judicial decisions rejecting direct enforcement of ICJ decisions, see A. Mark Weisburd, *International Courts and American Courts*, *supra*, at 886-87.

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[7] The Brief of Former United States Diplomats as *Amici Curiae* in Support of Petitioner, at 26 n. 55, suggests the relevance of an analogy between the deference federal courts typically give to agency interpretations of their authorizing statutes, see *Chevron USA Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984), and the interpretation that the International Court of Justice has given to a treaty. One should note first that the source cited in the footnote refers to deference given to the views of other signatories, not to the views of international tribunals established by such treaties. Second, *Amici*'s argument confuses the questions of, on the one hand, interpreting the meaning of a treaty and the international obligations it imposes, and, on the other hand, determining how, under its domestic law, a state should implement its international law obligation. This case involves only the latter question, and on this issue neither the views of the ICJ or those of signatories to the Vienna Convention deserve any deference. If any governmental actor merits *Chevron* deference on the question of how the United States should implement its international obligations, it is the President, who under Article II has responsibility for conducting the foreign relations of the United States. Curtis A. Bradley, *Chevron Deference and Foreign Affairs*, 86 VA. L. REV. 649 (2000).

European practice regarding the European Court of Human Rights also is instructive. This international tribunal oversees compliance with the European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, a treaty with 45 parties that

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[8] The Brief of International Law Experts as *Amicus Curiae* in Support of Petitioner, at 25, cites the dismissal of an arrest warrant by a Belgian court as an instance of a national court enforcing an order of the ICJ. A review of the press account cited as the source of this claim, however, reveals that the Belgian judges did *not* base their decision on the order of the ICJ. According to the press account:

> They based their judgment on an article of the Code of Criminal Procedure of 1878, which stipulates that cases against foreigners relating to offences committed abroad can only be tried if the foreign national in question is on Belgian soil at the time the case is brought.

War Crimes Case Against Former Foreign Minister "Inadmissible," AFRICA NEWS, Apr. 17, 2002, *available in* LEXIS, News Library, Allnws File. For independent confirmation of the accuracy of the press report, and of the inaccuracy of the Brief of International Law Experts, see Constanze Schulte, COMPLIANCE WITH DECISIONS OF THE INTERNATIONAL COURT OF JUSTICE 270 (2004).

protects basic human rights in the covered countries. Since 1998, individuals have had the right to bring a case directly to the European Court of Human Rights. But enforcement of its judgments, including orders for compensation, depends entirely on national law, not the Convention itself. In the United Kingdom, for example, it is the Human Rights Act 1998, ch. 42 (Eng.), that provides the legal basis for domestic enforcement of the Convention. For a recent discussion of the relationship between the Convention and British law, see *A v. Secretary of State*, 2004 UKHL ¶ 42 (H.L. 2004). Even European nations whose constitutions subordinate domestic legislation to international law, such as Germany, Italy, and the Netherlands, do not give direct effect to the judgments of the European Court of Human Rights. For a thorough discussion of practice in these countries, see THE EXECUTION OF STRASBOURG AND GERMAN HUMAN RIGHTS DECISIONS IN THE NATIONAL LEGAL ORDER (Tom Barkhuysen et al. eds. 1999).

The European Union (EU) and the European Community (EC), the EU's principal institutional structure, rest on treaties which, in the case of the European Community, create judicial bodies. The parties to these treaties do regard the decisions of the judicial bodies of the European Community, namely the European Court of Justice (ECJ) and the ECJ's Court of First Instance, as generally having direct effect in their domestic legal order. See, *e.g.*, *Regina v. Secretary of State for Transport ex parte Factortame Ltd.*, [1991] 1 All E.R. 70 (H.L.). But cf. *Brunner v. The European Union Treaty*, [1994] 1 C.M.L.R. 57 (German Federal Constitutional Court) (reserving right to review decisions of ECJ for compliance with German constitutional order). This outcome, however, results not from an abstract sense of obligation to comply with the orders of international tribunals, but rather because of explicit provisions in the treaty constituting the EC. Consolidated

Version of the Treaty Establishing the European Community, Dec. 24, 2002, O.J. (C 325) 33, Articles 228, 244, 256. These articles expressly impose on domestic courts the obligation to carry out the orders of the ECJ.

The direct enforcement of ECJ decisions by the member states does not represent a new approach generally to the domestic incorporation of the international law. The EC involves a distinctive, if not unique, level of extensive and intensive cooperation among the members. Direct enforcement of the ECJ's decisions facilitates that cooperation, much like the decisions of this Court promote the smooth workings of our federal union. Rather than serving as a new model of international adjudication, the ECJ's operates in relation to the legal system of the member states much as this Court does with respect to the legal systems of the several States.

In particular, the ECJ's approach to international law (the foundational treaties of the EU and the EC aside) closely resembles the traditional posture of this Court. Like this Court, the ECJ recognizes that the decisions of international tribunals are informative, but that treaty provisions obligating the EC to submit disputes to a tribunal do not mean that the decisions of those tribunals become part of EC law. In particular, the ECJ considers the decisions of the ICJ as evidence of the content of international law in cases where it must look to international law for a rule of decision, but it reserves solely for itself the authority to make a conclusive determination. See, *e.g., A.Racke GmbH & Co. v. Hauptzollamt Mainz (Case C-162/96)*, 1998 E.C.R.I-3655; *Anklagemyndigheden v. Poulsen (Case C-286/90)*, 1992 E.C.R. I-6019. One member of the ICJ has captured exactly the relationship between the two tribunals:

> The European Court, as we have seen, regards the provisions of customary international law as part of the legal order of the European Communities, and the International Court of Justice's findings as a useful short-route to identifying what customary international law on a given topic may be.

Rosalyn Higgins, *The ICJ, the ECJ, and the Integrity of International Law*, 52 INT'L & COMP. L.Q. 1, 10 (2003).

That the decisions of other international tribunals, when interpreting treaty obligations that bind the EC, cannot directly become part of EC law is illustrated by several decisions. In *Chiquita Brands International v. Commission (Case T-19/01)*, 2005 E.C.R. II-___, *available at http://curia.eu.int* (last visited February 21, 2005) (Court of First Instance), the court ruled that a U.S. firm injured by the EC's barriers to the importation of bananas, a legal regime that the WTO dispute settlement body deemed in violation of the Uruguay Round Agreements, had no rights under EC law. In another case, the ECJ ruled that the Treaty Establishing the European Community barred the EC from becoming a party to the European Convention on Human Rights, because such a step would transform both the Convention itself and the rulings of the European Court of Human Rights into EC law. *Accession by the Communities to the Convention for the Protection of Human Rights and Fundamental Freedoms (Opinion 2/94)*, 1996 E.C.R. I-1759. The clear implication of this somewhat terse opinion is that the Treaty as presently constituted would not permit another international tribunal, namely the European Court of Human Rights, to assume any portion of the ECJ's function of having the final say about all aspects of EC law.

CONCLUSION

The court below lacked jurisdiction to decide the questions presented by petitioner. Moreover, no treaty to which the United States is a party itself requires the courts of the United States to enforce the orders of the International Court of Justice, and any treaty that did so require would present serious constitutional questions. The course urged on this Court by petitioner, far from bringing U.S. practice into conformity with that of other nations, would give international law and the decisions of international tribunals a role in the U.S. legal system that other nations do not permit in their own legal systems. Accordingly, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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APPENDIX

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IN THE

Supreme Court of the United States

JOSE ERNESTO MEDELLIN,
Petitioner,
v.

DOUG DRETKE, Director, Texas Department
of Criminal Justice, Institutional Division,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION, RANDY AND SANDRA ERTMAN, ALLIED EDUCATIONAL FOUNDATION, AND U.S. REPRESENTATIVES STEVE CHABOT AND WALTER B. JONES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. Are Petitioner's claims under the Vienna Convention on Consular Relations procedurally barred because he failed to raise them in a timely manner?

2. If Petitioner's claims are procedurally barred, should the Court nonetheless order the district court to consider those claims in the interests of judicial comity and uniform treaty interpretation, in light of the International Court of Justice's decision in *Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. No. 128 (Mar. 31, 2004)?

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INTERESTS OF *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a public interest law and policy center with supporters in all 50 states.[1] WLF devotes a significant portion of its resources to promoting the rights of crime victims and has regularly appeared before this Court and other federal and state courts to advocate for greater judicial recognition of those rights as well as the need to streamline appellate review of criminal sentences. *See, e.g., Lynn v. Gathers, cert. denied* 540 U.S. 1141 (2004); *Felker v. Turpin*, 518 U.S. 65 (1996); *Payne v. Tennessee,* 501 U.S. 808 (1991). WLF has also appeared before this Court in support of its view that federal courts should base their decisions on international law only to the extent that Congress has decided to incorporate that international law as part of our domestic law. *See, e.g., Sosa v. Alvarez-Machain*, 124 S. Ct. 2739 (2004).

Randy and Sandra Ertman are the parents of Jennifer Lee Ertman, one of the two teenage girls who were brutally raped and murdered by Petitioner. Mr. and Mrs. Ertman have endured more than a decade of appellate review of Petitioner's conviction and sentence and believe that it is time to bring that review to an end. The Ertmans attended each of the trials of their daughter's killers; they were granted the opportunity to address the defendants at the conclusion of several of those proceedings and to describe the tremendous impact that their daughter's murder has had on the lives of her surviving relatives.

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, contributed monetarily to the preparation and submission of this brief.

The Honorable Steve Chabot is a United States Representative from Ohio, and the Honorable Walter B. Jones is a United States Representatives from North Carolina. As Members of Congress, both have supported efforts to limit the jurisdiction of federal courts to second-guess criminal sentences handed down by state courts. In particular, both have worked to limit the jurisdiction of federal courts to invoke either federal law or international law to overturn state-court decisions that rest on an adequate foundation of state substantive law.

The Allied Educational Foundation (AEF) is a nonprofit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in this Court on a number of occasions.

Amici oppose efforts to elevate decisions of the International Court of Justice (ICJ) to a status above that of other federal law. Even if, as Petitioner contends, ICJ decisions in some instances should be deemed a part of federal law, *amici* believe that such decisions are but one source of federal law and cannot be invoked as a basis for ignoring well-established federal law that both pre-dates and post-dates adoption of the Vienna Convention. Where, as here, a defendant was convicted of a gruesome murder more than a decade ago and every appellate court has concluded that he received a fair trial, *amici* do not believe that he should be permitted to continue to delay his sentence by invoking a new issue that he failed to raise until years after his initial conviction.

Amici are filing this brief with the consent of all parties. Counsel for Petitioner filed with the Court a blanket consent to

all *amicus* briefs on December 17, 2004. A letter of consent from counsel for Respondent has been lodged with the Court.

STATEMENT OF THE CASE

Amici hereby incorporate by reference the Statement of the Case contained in Respondent's brief.

In brief, Petitioner Jose Ernesto Medellin stands convicted of the particularly gruesome rape and murder of two teenage girls in Houston, Texas 12 years ago. The victims, 14-year-old Jennifer Lee Ertman and 16-year-old Elizabeth Pena, were friends and classmates at Waltrip High School in Houston. They had the misfortune of running into Medellin and fellow gang members, whom they did not know, while walking home on the evening of June 24, 1993. The gang members brutally raped both girls vaginally, anally, and orally for more than an hour. Medellin and the other gang members then took the girls to a wooded area to be killed so that they could not report the attacks. Medellin personally strangled at least one of the girls, and perhaps both, with their own shoe laces. He later complained that he had difficulty in getting Jenny Ertman to die and had to step on her throat to finish the murder. The girls' badly decomposed bodies were discovered four days later after a call from a brother of one of the gang members led them to the site.

Overwhelming evidence of Medellin's guilt was presented at his September 1994 trial. In addition to forensic evidence, the evidence included the testimony of several witnesses to whom Medellin had bragged of his exploits immediately after the crime -- including boastful statements that both of the girls were virgins until Medellin and other gang members had raped them. The evidence also included inculpatory statements given to police by various gang members (following waiver of *Miranda* rights), including a written statement by Medellin in which he admitted raping Elizabeth Pena but denied direct participation in the murders. On September 16, 1994, Medellin was convicted of murder during the course of a sexual assault. Following the punishment phase of Medellin's trial, during which the jury heard about Medellin's extensive gang-related illegal activity (including a 1992 gang-related fight that led to his expulsion from school), he was sentenced to death on October 11, 1994.

Although Medellin has lived in the United States most of his life and speaks English fluently, he was born in Mexico and is a citizen of that country. But there is no evidence that law enforcement personnel knew that Medellin was a Mexican citizen; the state court hearing his habeas corpus petition found that there was no testimony at his trial that he was not a U.S. citizen or that he told anyone that he was a Mexican national. Pet. App. 47a. Article 36(1) of the Vienna Convention on Consular Rights[2] provides that when an individual is arrested outside of his nation of citizenship, the nation undertaking the arrest shall, among other things, "without delay" inform the person detained of his right to communicate with consular officers from his native country. Although police officers read Medellin his *Miranda* rights following his arrest (and he explicitly waived his right to remain silent), it is uncontested that he was not informed of his Vienna Convention right to communicate with Mexican consular officials.

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[2] 21 U.S.T. 77, 596 U.N.T.S. 261 ("Vienna Convention"). Article 36 of the Vienna Convention is reprinted at Pet. App. 137a-138a.

Medellin's counsel did not raise the Vienna Convention issue at trial.[3] Nor did he do so in connection with Medellin's direct appeal of his conviction and sentence. Medellin did not raise the issue until he filed an application for a writ of habeas corpus with the trial court nearly *four years* after his conviction.

The Texas Court of Criminal Appeals affirmed Medellin's conviction and sentence in March 1997. Pet. App. 1a-31a. He did not seek review of that decision in this Court. In January 2001, the trial court recommended that Medellin's habeas corpus petition be denied. *Id.* 34a-58a. The trial court rejected claims that Medellin had not received effective assistance of counsel at trial and on direct appeal. *Id.* It further found that Medellin had waived his right to object to his conviction based on any violations of the Vienna Convention because he did not raise that objection either during or before trial. *Id.* 46a-48a. It further found that reversal of the conviction or sentence based on any Vienna Convention violation was unwarranted in the absence of any showing that Medellin had been prejudiced by the violation. *Id.* 48a. Based on the trial court's findings and conclusions, the Texas Court of Criminal Appeals denied Medellin's habeas corpus petition in October 2001. *Id.* 33a-34a.

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[3] Had he done so, the trial judge would, of course, have been in a position to take any corrective action he deemed necessary to ensure a fair trial. For example, if he determined that police failed to inform Medellin of his consular rights despite knowledge of his Mexican citizenship, he could have considered a request to exclude Medellin's written statement to police or to delay the trial until Mexico had been given an opportunity to provide whatever legal assistance it might have chosen to give the defense.

Medellin thereafter filed a habeas corpus petition in federal district court in Houston. The district court denied that petition in June 2003. *Id.* 59a-118a. The court denied Medellin's ineffective assistance of trial counsel claim on the merits. *Id.* The court rejected Medellin's Vienna Convention claim, both on the merits and because consideration of the claim was barred by Texas's contemporary objection rule. *Id.* 79a-85a. Citing this Court's decision in *Breard v. Greene*, 523 U.S. 371 (1998), the district court held, "Medellin forfeited consideration of his Vienna Convention claim by failing to comply with an adequate and independent state procedural rule." *Id.* 82a.

While Medellin's appeal to the Fifth Circuit was pending, the International Court of Justice (ICJ) issued its decision in *Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. No. 128 (Mar. 31, 2004). Pet. App. 174a. *Avena* was a proceeding initiated by Mexico against the United States, in which Mexico complained that American police routinely fail to advise Mexican nationals arrested in the United States of their right to communicate with Mexican consular officials. Although neither Medellin nor Texas was a party to that proceeding, the complaint alleged that Medellin and 51 other individuals sentenced to death by American courts had not been afforded their rights under the Vienna Convention.

The *Avena* decision contains no indication that the ICJ had before it any specific information regarding Medellin's case. The decision indicates that Mexico submitted to the ICJ declarations from "a number" of the 52 Mexican nationals, attesting that they had never been informed of their Vienna Convention rights, but it does not indicate whether Medellin was one of those who provided an affidavit. *Avena*, ¶ 76. The decision further indicates that Medellin's was not one of the cases in which the United States submitted evidence contesting Mexico's allegation that the defendants were not provided timely notification of their Vienna Convention rights. *Id.* ¶¶ 74-90. Based on that evidence, the ICJ concluded that the United States had violated the Vienna Convention rights of Medellin and 50 of the 51 other Mexican nationals. *Id.* ¶ 90. The ICJ ruled that an appropriate remedy for those violations consisted of an obligation of the United States to "permit review and reconsideration of these nationals' cases by the United States courts" to determine whether any of the violations "caused actual prejudice to the defendant in the process of administration of criminal justice." *Id.* ¶ 121. The ICJ further ruled that this "review and reconsideration" obligation should be carried out without regard to any "procedural default" rule whereby the defendant could be deemed to have waived his right to raise Vienna Convention issues by failing to raise them in state court. *Id.* ¶¶ 111-113, 133-143.

The parties brought the *Avena* decision to the attention of the Fifth Circuit. The Fifth Circuit nonetheless denied Medellin's request for a certificate of appealability (COA) from the district court's habeas corpus petition. Pet. App. 119a-135a. The appeals court denied Medellin a COA on his ineffective assistance of counsel claim, holding that "no reasonable jurist" could uphold Medellin's claim. *Id.* 123a-31a. The court also denied a COA on Medellin's Vienna Convention claim, holding both that the claim was procedurally defaulted and that the Vienna Convention does not confer an individually enforceable right. *Id.* at 131a-133a. The court recognized that *Avena*'s ruling on procedural defaults contradicted *Breard*, but held that *Breard* "directly control[led]" and that it was bound to follow *Breard*. *Id.* at 132a.

SUMMARY OF ARGUMENT

In determining that Texas's contemporaneous objection rule barred federal court consideration of Medellin's Vienna Convention claim, the Fifth Circuit was simply adhering to a long-recognized provision of federal law. The Texas courts, like the courts of numerous other states, have insisted that criminal defendants who contend that their trial is being conducted unfairly to raise their objections with the trial court in order to permit the presiding judge to correct any unfairness. Because Medellin did not object at trial to Texas's failure to inform him of his Vienna Convention right to communicate with Mexican consular officials, the Texas courts invoked their contemporaneous objection rule to hold that Medellin had waived his right to raise that objection on habeas review. Pet. App. 46a-49a. This Court has long held that application of a state contemporaneous objection rule provides an adequate foundation of state substantive law for maintaining custody over an individual, and thus bars granting federal habeas relief to that individual. *See, e.g., Coleman v. Thompson,* 501 U.S. 722, 730 (1991). Medellin does not contest that he failed to raise any Vienna Convention issues at trial, and he has not sought review of the lower courts' determination that his trial counsel provided effective legal assistance. Nor has he sought to invoke the "cause" and "prejudice" exception to that procedural default bar. Under those circumstances, the Fifth Circuit's denial of a COA on the Vienna Convention claim was an unexceptional application of federal law.

Medellin's claim that the normal procedural default rule is inapplicable to this case is based entirely on the ICJ's *Avena* decision. Medellin notes that the Vienna Convention is a part of federal law by virtue of its ratification by the U.S. Senate in 1969. He notes further that the United States is a party to the Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, 21 U.S.T. 325, 596 U.N.T.S. 487 ("Optional Protocol"), which commits signatories to submit disputes arising under the Vienna Convention to binding adjudication by the ICJ. Medellin contends that *Avena*'s interpretation of the Vienna Convention is, by virtue of the Senate's ratification of the Optional Protocol, just as much a part of federal law as is the Vienna Convention itself. Medellin contends that *Avena*'s status as "federal law" requires this Court to give effect to that decision and thus to order the lower federal courts to consider the merits of Medellin's Vienna Convention claims without regard to Texas's contemporaneous objection rule.

The principal flaw in Medellin's rationale is his contention that the Vienna Convention, as interpreted by the ICJ, merits an exalted position in the federal-law hierarchy and thereby trumps all other sources of federal law. Even accepting for the sake of argument that the ICJ's rather far-fetched interpretation of the Vienna Convention should be deemed to embody the intent of the U.S. Senate in ratifying that treaty, there is no basis for asserting that that interpretation supersedes the numerous conflicting federal laws that also can claim to embody the will of Congress. It is emphatically the role of this Court, not the ICJ, to resolve that conflict by determining what federal law requires. In light of federal laws that endorse continued application of this Court's procedural default case law and that were enacted *after* the 1969 ratification of the Vienna Convention, Congress cannot be understood to have intended the result espoused by Medellin.

Medellin contends that *Avena* "provides the rule of decision" for this case and thus is binding on the federal courts. Pet. Br. 39. If by that argument Medellin is contending that either the doctrine of claim preclusion or of issue preclusion is applicable to this case, that is just plain silly. Texas was not a party to *Avena* and thus cannot be bound by the ICJ's decision. The most that can be claimed is that the federal courts should accept the ICJ's ruling as the definitive statement of the requirements of the Vienna Convention, but as noted above those requirements cannot be deemed to grant the federal courts authority to second-guess a State's detention of an individual when subsequently enacted federal laws make clear that federal courts are denied such authority.

Indeed, the Fifth Circuit's denial of a COA is unassailable under the explicit terms of the statute governing issuance of COAs, 28 U.S.C. § 2253(c)(2). That statute provides that a COA may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." Medellin has not made such a showing; at most he has demonstrated that he was denied rights under a federal treaty.

Medellin argues alternatively that the Court should give effect to *Avena* "in the interest of judicial comity and uniform treaty application." Pet. Br. 45. That argument is without merit. Indeed, the interests of judicial "comity" point in exactly the opposite direction: the federal courts' acceptance of the independent-and-adequate-state-ground doctrine as a basis for denying federal habeas corpus relief to a large extent is grounded in concerns of comity to state courts. Unless federal courts accept that doctrine, state criminal defendants would have little incentive to abide by well-justified state procedural rules such as the contemporaneous objection rule. More importantly, the federal courts have no license to ignore otherwise controlling federal law in the interests of pleasing foreign courts and governments. Nor does a desire to promote "uniform treaty application" have any relevance to this case. Medellin has not suggested that the judicial system of any other nation even remotely resembles the American system. Thus, there is no reason to suppose that the ICJ's efforts to dictate how the Vienna Convention is to be applied in federal courts could ever be replicated in the courts of any other nation.

ARGUMENT

I. FEDERAL LAW DICTATES THAT FEDERAL HABEAS RELIEF BE DENIED WHEN, AS HERE, THE PETITIONER'S DETENTION IS JUSTIFIED BY AN INDEPENDENT AND ADEQUATE STATE GROUND

The procedural history of this case is uncontested: Medellin was represented at trial by competent counsel who chose not to raise a claim under the Vienna Convention. It was not until *nearly four years* after his conviction that Medellin first raised such a claim, in connection with his 1998 state habeas petition. Invoking the State's contemporary objection rule, the Texas Court of Criminal Appeals held that Medellin had waived that claim by failing to raise the claim at trial. Under those circumstances, it was totally unexceptionable for the lower federal courts to conclude that the Vienna Convention claim was procedurally defaulted.

For at least 28 years, since its decision in *Wainwright v. Sykes*, 433 U.S. 72 (1977), this Court has strictly adhered to the rule that federal habeas claims are barred when a state court previously has declined to address a prisoner's federal claims because the prisoner had failed to meet a state procedural requirement. In such cases, the state judgment is deemed to rest on "independent and adequate state procedural grounds" and thus is largely immune from second-guessing in the federal courts. *Coleman*, 501 U.S. at 730. A firmly established and regularly followed state procedural requirement is deemed an "inadequate" state ground only when the State has no legitimate interest in the rule's enforcement, *Osborne v. Ohio*, 495 U.S. 103, 124 (1990), or when the rule is being applied in an "exorbitant" fashion to a defendant who "substantially complied" with the rule. *Lee v. Kemna*, 534 U.S. 362, 376, 382 (2002).

Neither of those exceptions has any application to this case. Indeed, the Court has on numerous occasions held that States have a "legitimate" interest in enforcing the procedural rule invoked by Texas in this case -- the contemporaneous objection rule. Thus, in *Osborne*, the Court observed that a contemporaneous objection rule "serves the State's important interest in ensuring that counsel do their part in preventing trial courts" from committing reversible error. *Osborne*, 495 U.S. at 123.

A contemporaneous objection by trial counsel plainly could have served that purpose in this case. Had Medellin raise his Vienna Convention claim at the start of trial, the trial judge could have addressed any possible sources of prejudice to Medellin caused by the failure of Houston police to inform him of his right to communicate with Mexican consular officials. For example, if counsel had argued that Medellin would not have provided a written statement to police but for their failure to inform him of his consular rights, the trial judge could have considered a request to exclude that statement from the trial.[4] Medellin suggests that if had been prompted to

exercise his right to contact Mexican consular officials, those officials might have assisted the defense "by providing funding for experts and investigators, gathering mitigating evidence, acting as a liaison with Spanish-speaking family members, and, most importantly, ensuring that [Medellin was] represented by competent and experienced trial counsel." Pet. Br. 5-6. But if counsel had raised the issue prior to trial, the trial judge might well have been receptive to a Vienna Convention-based adjournment of the trial date, to give Mexican officials adequate time to provide whatever services they might have been willing to provide. Because trial counsel chose not to raise a Vienna Convention claim at trial, Medellin has only himself to blame for the fact that the trial judge did not consider providing relief from any prejudice that may have arisen due to the failure of police to inform him of his consular rights immediately after his arrest.

Nor can application of the contemporaneous objection rule to Medellin be viewed as an "exorbitant" application to someone who has "substantially complied" with the rule. Medellin did not raise anything that even remotely resembled a contemporaneous objection to the failure to inform him of his Vienna Convention rights. Despite being represented by competent counsel, he waited nearly four years after his conviction to raise the issue for the first time. Moreover, as the Texas courts found, Medellin introduced nothing into the trial record that would have alerted prosecutors to his Mexican citizenship. Pet. App. 47a. The ICJ deemed it of no moment that Mexican nationals such as Medellin had not raised Vienna Convention issues in a timely manner, because in its view any tardiness on the part of defendants and their counsel could be excused in light of the police's failure in the first instance to alert Mexican nationals to their consular rights. *Avena*, ¶ 113. But that rationale is inconsistent with the approach this Court has adopted in procedural default cases based on failure to comply with contemporaneous objection rules. *Wainwright* rejected under analogous circumstances a similar excuse for failing to make a contemporaneous objection. The federal habeas petitioner in *Wainwright* claimed that inculpatory statements he made to police should be suppressed because he was given an inadequate *Miranda* warning. In finding that claim procedurally defaulted, the Court rejected arguments that a failure to inform a defendant of his *Miranda* rights could excuse his counsel from making a timely objection to use of custodial statements obtained in violation of those rights. *Wainwright*, 433 U.S. at 87-91.

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[4] *Amici* do not mean to suggest that such exclusion would have been appropriate. To the contrary, we deem it highly implausible that Medellin, having voluntarily waived his right to remain silent despite being given a *Miranda* warning, would have chosen not to waive that right if also informed of his consular rights. In any event, given the overwhelming evidence of Medellin's guilt, there is little likelihood that the exclusion of Medellin's written statement would have affected the jury's verdict.

Application of the contemporaneous objection rule in this case will, of course, leave Medellin without an opportunity to argue in federal court that he was prejudiced by the failure of police to inform him of his Vienna Convention right to communicate with Mexican consular officials. But as this Court recognized in *Breard*, "although treaties are recognized by our Constitution as the supreme law of the land, that status is no less true of provisions of the Constitution itself, to which rules of procedural default apply." *Breard v. Greene*, 523 U.S. at 376. Medellin has provided no rationale explaining why procedural default rules should apply to a criminal defendant's constitutional claims but not to claims involving an alleged treaty violation.

The Court recognizes that a procedural default does not bar assertion of the defaulted claim in a federal habeas proceeding if "the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman*, 501 U.S. at 750. But Medellin has never asserted that he can meet the "cause" and "prejudice" standard. In the absence of such evidence, well-established federal law dictates that his Vienna Convention claim be deemed procedurally defaulted.

II. EVEN IF THE COURT ACCEPTS *AVENA* AS BINDING FEDERAL LAW, CONGRESS CANNOT BE DEEMED TO HAVE INTENDED TO PERMIT THE WHOLESALE RE-EXAMINATION OF STATE COURT JUDGMENTS ADVOCATED BY MEDELLIN

Medellin's claim that the normal procedural default rules are inapplicable to this case rests entirely on the ICJ's *Avena* decision. As noted above, the decision arose in connection with a complaint filed by Mexico against the United States, involving 52 Mexican nationals who had been convicted of murder in State courts and were facing death sentences. Although the ICJ had before it only minimal evidence regarding those 52 individuals, it determined that the United States had violated the Vienna Convention rights of Medellin and 50 of the 51 other Mexican nationals. *Avena*, ¶ 90. As a remedy it ordered the federal courts in the United States to review each of the cases to determine whether the Mexican nationals had suffered "actual prejudice" as a result of the violation of their Vienna Convention rights. *Id.* ¶ 121. The ICJ further ruled that this review should be carried out without regard to any "procedural default" rule whereby the defendant could be deemed to have waived his right to raise Vienna Convention issues by failing to raise them in State court. *Id.* ¶ 111-113, 133-143.

The ICJ's interpretation of its mandate was remarkably broad, far broader than readings of the Vienna Convention and the Optional Protocol previously rendered by federal courts and Executive Branch officials. Among the ICJ's holdings: the Vienna Convention provides individually enforceable rights;[5] the Vienna Convention and the Optional Protocol grant the ICJ *unlimited* jurisdiction to grant *whatever* relief the ICJ deems appropriate to effectuate the purposes of the Vienna Convention;[6] and although Article 36(2) of the Vienna Convention provides that the consular rights set forth in Article 36(1) are to "be exercised in conformity with the laws and regulations of the receiving State," that language does not impose any substantive limitations on the ICJ's power to direct the operations of the receiving State's courts because Article 36(2)'s proviso effectively grants the ICJ unbridled authority to order whatever relief it deems necessary to carry out the purposes of the Vienna Convention.[7]

Medellin notes that the Vienna Convention is a part of federal law by virtue of its ratification by the U.S. Senate in 1969. He further notes that the United States is a party to the Optional Protocol, which commits signatories to submit disputes arising under the Vienna Convention to binding adjudication by the ICJ. Medellin contends that *Avena*'s

interpretation of the Vienna Convention is, by virtue of the Senate's ratification of the Optional Protocol, just as much a part of federal law as is the Vienna Convention itself. Medellin contends that *Avena*'s status as "federal law" requires this Court to give effect to that decision and thus to order the lower federal courts to consider the merits of Medellin's Vienna Convention claims without regard to Texas's contemporaneous objection rule.

As a initial matter, Medellin has vastly overstated the powers that the United States Senate entrusted to the ICJ when it ratified the Optional Protocol. Medellin would have the Court believe that the Senate granted the ICJ the jurisdiction and authority to adopt *any* rule that the ICJ, in its sole discretion, deems necessary to effectuate the terms of the Vienna Convention. Carried to its logical extremes, that authority would include the power to demand such "remedies" as: an order requiring that all criminal charges be dropped against any alien in the United States whose Article 36 consular rights are deemed violated; an order requiring that any such alien not be subject to deportation after all criminal charges are dropped; or an order requiring the criminal prosecution and incarceration of police officers who fail to comply with the Vienna Convention in their treatment of detained foreigners. The intent of the Senate is the ultimate touchstone in discerning the meaning of the Optional Protocol. Because the Senate cannot possibly have intended to grant the ICJ jurisdiction and authority to grant relief of the sort outlined above, the Vienna Convention and Optional Protocol must be deemed to include *some* limits on the ICJ's authority to determine its own authority. *Amici* respectfully submit that the ICJ may well have exceeded those limits when it interpreted the Article 36(2) proviso as authorizing it to adopt *whatever* remedies it deems necessary to give "full effect" to the purposes of Vienna Convention -- an interpretation that essentially writes the "shall be exercised in conformity with the laws and regulations of the receiving State" language out of Article 36(2).[8]

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[5] Many courts have held that Article 36 of the Vienna Convention does not create any judicially enforceable rights. *See, e.g., United States v. Jimenez-Nava,* 243 F.3d 192, 198 (5th Cir. 2001).

[6] *Avena,* ¶¶ 27-35.

[7] Article 36(2) provides, "The rights referred to in [Article 36(1)] shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended."

But the Court need not reach that issue in order to affirm the judgment below. Even accepting Medellin's contention that the *Avena* decision constitutes federal law, it does not follow that this Court must give effect to that decision by ordering the lower federal courts to consider the merits of Medellin's Vienna Convention claims without regard to Texas's contemporaneous objection rule. The principal flaw in Medellin's rationale is his contention that the Vienna

Convention, as interpreted by the ICJ, merits an exalted position in the federal-law hierarchy and thereby trumps all other sources of federal law. Even accepting for the sake of argument that the ICJ's rather far-fetched interpretation of the Vienna Convention should be deemed to embody the intent of the U.S. Senate in ratifying that treaty, there is no basis for asserting that that interpretation supersedes the numerous conflicting federal laws that also can claim to embody the will of Congress.

Indeed, this Court identified one conflicting federal law in *Breard.* The Court noted that the Antiterrorism and Effective Death Penalty Act (AEDPA) amended the habeas corpus statute in 1996 to provide that "a habeas petitioner alleging that he is held in violation of 'treaties of the United States' will as a general rule, not be afforded an evidentiary hearing if he 'has failed to develop the factual basis of [the] claim in State court proceedings.'" *Breard*, 523 U.S. at 376 (quoting 28 U.S.C. §§ 2254(a), (e)(2)). The Court concluded that that provision prevents an individual being held under state law from raising Vienna Convention claims in a federal habeas proceeding if the claims have been procedurally defaulted in state court:

> Breard's ability to obtain relief based on violations of the Vienna Convention is subject to this subsequently-enacted rule [*i.e.*, enactment following ratification of the Vienna Convention in 1969], just as any claim arising under the United States Constitution would be. This rule prevents Breard [who had procedurally defaulted on his Vienna Convention claim by failing to raise it in state court] from establishing that the violation of his Vienna Convention rights prejudiced him. Without a hearing, Breard cannot establish how the Consul would have advised him, how the advice of his attorneys differed

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[8] In his dissent from the denial of a writ of certiorari in *Torres v. Mullin*, 540 U.S. 1035 (2003), Justice Breyer identified the crucial question to be answered in future Vienna Convention cases as the extent to which "the ICJ has been granted the authority, by means of treaties to which the United States is a party, to interpret the rights conferred by the Vienna Convention." *Torres*, 540 U.S. at 1041. Justice Breyer intimated that that grant of authority might indeed be quite broad:

> The answer to Lord Ellenborough's famous rhetorical question, "Can the Island of Tobago pass a law to bind the rights of the whole world" may well be yes, where the world has conferred such binding authority through treaty. *See Buchanan v. Rucker*, 9 East 192, 103 Eng. Rep. 546 (K.B. 1808). It is this kind of authority that Torres and Mexico argue the United States has granted to the ICJ when it comes to interpreting the rights and obligations set forth in the Vienna Convention.

Id. *Amici* would add to Justice Breyer's observation that any interpretation of a treaty that conferred on the Island of Tobago authority to "pass a law to bind the rights of the whole world" is unlikely to be an accurate interpretation, in light of the implausibility that all the nations of the world would delegate such unlimited authority to a small island nation.

> from the advice the Consul could have provided, and what factors he considered in electing to reject the plea bargain that the State offered him.

Id.

Another relevant statute adopted by Congress in 1996 as part of the AEDPA is 28 U.S.C. § 2253(c), which established the requirement that no appeal may be taken from a district court order denying a habeas corpus petition unless the petitioner obtains a certificate of appealability (COA) from either the district court or the court of appeals. Section 2253(c)(2) provides that a judge may issue a COA "only if the applicant has made a substantial showing of the denial of a constitutional right." As this Court has explained, § 2253(c) establishes a "jurisdictional prerequisite" to an appeal to the court of appeals; "until a COA has been issued federal courts of appeals lack jurisdiction to rule on the merits of appeals from habeas petitioners." *Miller-El v. Cockrell,* 537 U.S. 322, 336 (2003).

The Fifth Circuit denied Medellin a COA on his Vienna Convention claim, and Medellin has sought review of that denial. By the plain terms of § 2253(c), the Fifth Circuit properly denied the COA. That statute does not permit COAs to issue where the applicant alleges (as does Medellin) that he has been denied rights under a federal *treaty*; rather COAs may only be issued to an applicant who makes a substantial showing that he has been denied a "constitutional right." In sum, even if Medellin is correct that *Avena* constitutes federal law, that law (adopted in 1969 when the Senate ratified the Vienna Convention and the Optional Protocol) must give way to subsequently adopted federal statutes that express Congress's more recent views on the proper scope of federal habeas corpus review of state court criminal proceedings.

Medellin also argues that *Avena* "provides the rule of decision" for this case and thus is binding on the federal courts. Pet. Br. 39. If by that argument Medellin is contending that either the doctrine of claim preclusion or of issue preclusion is applicable to this case, that is just plain silly. Texas was not a party to *Avena* and thus cannot be bound by the ICJ's decision. Nor could Medellin be serious in contending that this Court is in some sense subordinate to the ICJ, or that it is bound by the ICJ judgment because the United States government lost before the ICJ and the Court is a part of the United States government. "It is emphatically the province and duty" of the federal courts to say what the law is, *Marbury v. Madison,* 1 Cranch (5 U.S.) 137 (1803), not to slavishly adopt the decisions of some foreign tribunal. Medellin properly may attempt to persuade the Court that it should choose to adopt *Avena* as a part of the federal law, but there can be no legitimate argument that the final choice belongs to any body other than this Court. As Justice Breyer made clear in the context of Vienna Convention claims, "it is undoubtedly correct as a general matter" that "the ICJ does not exercise any judicial power of the United States." *Torres,* 540 U.S. at 1041 (Breyer, J., dissenting from denial of certiorari).

III. THE INTERESTS OF JUDICIAL COMITY AND UNIFORM TREATY INTERPRETATION CANNOT JUSTIFY ORDERING THE LOWER COURTS TO CONSIDER MEDELLIN'S VIENNA CONVENTION CLAIMS

Medellin argues alternatively that, even if *Avena* does not *require* his Vienna Convention claims to be heard on the merits (and, accordingly, would be procedurally barred under normally applicable habeas corpus rules), the Court should order the lower federal courts to "give effect" to *Avena* "in the interest of comity and uniform treaty interpretation." Pet. Br. 45. That argument is without merit.

Medellin suggests that the Court should adopt *Avena* because "respect is due the judgment of an international court to which the President and Senate have entrusted the resolution of a specified category of disputes." *Id.* But of necessity, extending comity to the decisions of the ICJ means overturning the decisions of state courts. *Amici* respectfully suggest that when it comes to choosing between extending comity to international courts and extending comity to state courts within the American judicial system, the later should prevail every time. Indeed, the independent-and-adequate-state-ground doctrine has developed as a permanent fixture of federal law largely because of comity concerns. *Coleman*, 501 U.S. at 730. The Court explained:

> Without the [independent-and-adequate-state-ground doctrine], a federal district court would be able to do in habeas what this Court could not do on direct review; habeas would offer state prisoners whose custody was supported by independent and adequate state grounds an end run around the limits of this Court's jurisdiction and a means to undermine the State's interest in enforcing its laws.

Id. at 730-31.

Sound practical consideration undergird adoption of the independent-and-adequate-state-ground doctrine, and those considerations would be undermined if the Court were to abandon that doctrine solely because it wanted to signal its respect for a foreign tribunal. For example, respecting state contemporaneous objection rules:

- enables a record to be made with respect to the defendant's claims "when the recollections of witnesses are freshest, not years later in a federal habeas proceeding." *Wainwright*, 433 U.S. at 88.

- promotes efficient use of judicial resources by, among other things, keeping potentially objectionable evidence out of the trial -- thereby either increasing the chances of acquittal (and thus bringing about a quick end of the case) or decreasing the number of remaining issues to be decided on appeal, in the event of a conviction. *Id.* at 88-89.

- discourages "sandbagging" by defense counsel, who might otherwise be tempted to hold back on one of their legal issues, thereby taking their chances on an acquittal while simultaneously holding their constitutional claim in reserve in case their initial gamble does not pay off. *Id.* at 89.

- promotes the perception of the trial in a criminal case in state court as a "decisive and portentous event." *Id.* at 90.

Medellin portrays the relief he seeks as a "minimal intrusion on Texas's criminal processes." Pet. Br. 47. That portrayal is wildly inaccurate. Granting Medellin the relief he seeks is likely to delay completion of the appellate process for at least two more years. Randy and Sandra Ertman have now had to endure more than a decade of post-conviction appeals; it would be a major hardship for them to be forced to endure significant additional delays in bringing to a close the case against the man who raped and murdered their daughter. And for what purpose? *Amici* cannot imagine how Medellin could ever demonstrate that the failure of police to inform him of his consular rights caused him such prejudice that he would be entitled to have his conviction and/or sentence overturned. He was represented at all times in these proceedings by competent counsel; he thought so little of the Vienna Convention issue that he did not even bother to inform the trial court that he was not a U.S. citizen; and the evidence of guilt was so overwhelming that any other verdict is difficult to imagine regardless how many additional resources the Mexican government might have brought to Medellin's case.

Moreover, Medellin is proposing that the Court adopt a new rule of law that entails borrowing foreign law to decide cases differently from the manner in which they would be decided under traditional habeas corpus procedural rules. This Court has cautioned that federal courts -- which are not empowered to create new doctrines of general federal common law -- should be extremely reluctant to look to international law norms rather than legislative guidance in deriving rules of decision in cases touching on foreign relations. *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2763 (2004).

Finally, granting Medellin's petition will do nothing to promote "uniform treaty interpretation." Medellin has not suggested that the judicial system of any other nation even remotely resembles the American system. Thus, there is no reason to suppose that the ICJ's efforts to dictate how the Vienna Convention is to be applied in federal courts could ever be replicated in the courts of any other nation. For example, much of *Avena* turned on the existence of parallel federal and state court systems in this country and the ability of criminal defendants to bring their appeals into federal court after they have exhausted all state-court avenues of appeal. *Avena* held that even though criminal defendants are entitled to raise their federal claims -- including Vienna Convention claims -- in state court, they must also be permitted to raise those claims in federal court, even when they have no good cause for having failed to raise the claims in state court. We do to see how that opinion can be applied in a "uniform" manner to a country that dictates, for example, that a criminal defendant convicted of a crime is entitled to one and only one appeal.

CONCLUSION

Amici curiae WLF, Randy and Sandra Ertman, the Allied Educational Foundation, and U.S. Representatives Steve Chabot and Walter B. Jones respectfully request that the Court affirm the decision below.

Respectfully submitted,

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